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In The

Supreme Court of the United States

October Term, 1997

**ESTATE OF JAMES PHILLIPS III,
RAYE M. PHILLIPS, SPECIAL ADMINISTRATOR
OF THE ESTATE OF JAMES PHILLIPS III,
and on her own behalf,**

Petitioners,

vs.

**CITY OF MILWAUKEE, PHILIP ARREOLA,
THEODORE BUSCH, ROBERT DUARTE, DENNIS HINTZ,
MARY RILEY, JAMES RICE and HAROLD RAY SCHMIDT,**

Respondents.

**On Petition For A Writ of Certiorari
To the United States Court of Appeals For the 7th Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the interest of resolving questions of immunity at the earliest stage in the litigation, the Seventh Circuit abandoned traditional summary judgment methodology and improperly engaged in resolving disputed facts in a light other than the one most favorable to the non-moving party?

2. Whether the Seventh Circuit erred when, at the summary judgment stage of the litigation, it refused to characterize the police officers' application of force as "deadly" for the purpose of assessing that component of Mr. Phillips' Fourth Amendment claim?

3. Whether the Fourteenth Amendment to the United States Constitution imposed upon the defendant police officers an affirmative duty to protect Mr. Phillips from the danger of suffocation attributable to their manner of restraint?

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PETITION FOR WRIT OF CERTIORARI

The plaintiff-petitioners, the Estate of James Phillips III and Raye Phillips, respectfully pray that a writ of certiorari be entered to review the United States Court of Appeals for the Seventh Circuit's August 15, 1997 order that affirmed the United States District Court for the Eastern District of Wisconsin's April 26, 1996 order granting summary judgment, on qualified immunity grounds, to determine whether evidence that the deceased plaintiff's demise was precipitated by both the defendant officers' manner of restraint, and their failure to protect the deceased plaintiff against suffocation, is sufficient to withstand defendants' application for summary judgment on qualified immunity grounds.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 928 F.Supp. 817 (E.D. Wis. 1996). The United States District Court for the Eastern District of Wisconsin's Order denying the plaintiffs' Motion for Reconsideration is dated June 3, 1996. The opinion of the United States Court of Appeal for the 7th Circuit is dated August 15, 1997 and is reported at 123 F.3d 586 (7th Cir. 1997). The United States Court of Appeals for the 7th Circuit's Order denying the plaintiffs' Petition for Rehearing and Suggestion for Rehearing *En Banc* is dated September 23, 1997.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

1. 42 U.S.C. 1983

2. In pertinent part, the Fourth Amendment to the United States Constitution reads: "The right of the people to be secure in their persons,..., against unreasonable searches and seizures shall not be violated...".

3. In pertinent part, the Fourteenth Amendment to the United States Constitution reads: "...nor shall any State deprive any person of life, liberty or property without due process of law...".

STATEMENT OF THE CASE

The plaintiffs brought a civil rights action under 42 U.S.C. 1983 charging, among other things, the police officers with misconduct, on May 6, 1993, when they handcuffed Mr. Phillips, after a horrific struggle, and left him face down, with his hands cuffed behind his back, without adequate supervision for a period of time sufficient for the plaintiff to suffocate to death. The United States District Court for the Eastern District of Wisconsin had jurisdiction of the plaintiffs' Complaint pursuant to 28 U.S.C. 1331 and 1343.

Plaintiffs asserted the officers' misconduct was unreasonable, deliberate, intentional, malicious, willful and wanton. The plaintiffs argued that the defendant officers' conduct violated Mr. Phillips' rights under the Fourth and Fourteenth Amendments to the United States Constitution.

On November 15, 1995 the defendants filed a Motion for Summary Judgment that claimed the police officers were entitled to dismissal of the lawsuit pursuant to the doctrine of qualified immunity. In its Decision and Order, dated April 26, 1996, that granted the police officers' summary judgment on qualified immunity grounds, the United States District Court for the Eastern District of Wisconsin ruled that the officers acted "...permissibly at every point" and that the plaintiff failed to: a) allege the violation of a constitutional right that was clearly established at the time of the police officer's actions, and b) establish a genuine issue as to any material fact. The district court declined to assess the police officers' conduct against the due process safeguards contained in the Fourteenth Amendment to the United States Constitution.

In their April 29, 1996 Motion for Reconsideration, the plaintiffs argued that the district court judge failed to analyze the facts according to well-established summary judgment methodology. Specifically, the plaintiffs complained that the district court failed to view the evidence in a light most favorable to the deceased plaintiff, the non-moving party.

In its June 3, 1996 Order, the district court judge denied the plaintiffs' Motion for Reconsideration.

The plaintiff appealed the district court's Order granting the police officers Motion for Summary Judgment to the United States Court of Appeals for the 7th Circuit. The court of appeals reviewed the district court's decision, to grant summary judgment in favor of the police, *de novo*.

In its August 15,1997 Decision, the 7thCircuit Court of Appeals determined that the officers were objectively reasonable in their handling of Mr. Phillips. The court of appeals declined to apply the Fourteenth Amendment to the officers' action (or, inaction) and, instead determined that the Fourth Amendment's reasonableness standard was the only standard by which to measure the officers' conduct.

In their August 27, 1997 Motion for Rehearing and Suggestion for *En Banc* Hearing, plaintiffs reiterated their complaint about the federal courts' improper assessment of the facts for the purpose of summary judgment.

The plaintiffs contended that the 7th Circuit Court of Appeals improperly viewed the facts in a light most favorable to the moving party. The court of appeals denied the plaintiffs' Motion for a Rehearing and Suggestion for Rehearing En Banc on September 23, 1997.

This petition asks only that this Court: a) view the facts in a light most favorable to the deceased plaintiff, the non-moving party, and b) assess those facts within the Fourth and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. HAD THE COURT OF APPEALS VIEWED THE FACTS, AT THE SUMMARY JUDGMENT STAGE IN A LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, IT WOULD NOT HAVE GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY GROUNDS

This issues herein require the Court to determine whether the defendant police officers are entitled to judgment, as a matter of law, on the grounds of the doctrine of qualified immunity.

On May 6, 1993, in a Milwaukee hotel room, Mr. Phillips engaged in a horrific struggle with two, of the four, defendant police officers, immediately prior to being placed face-down on the floor with his hands cuffed behind his back. It was there that he remained until two ambulance drivers appeared in the room and observed that Mr. Phillips was very livid, his lips were blue, his eyes were fixed and dilated, he was unresponsive and he wasn't breathing. The ambulance drivers alerted the four defendant police officers that Mr. Phillips was a pulseless non-breather (PNB). All the medical testimony indicated that Mr. Phillips could not have drawn a breath for, at least, 4-6 minutes for him to be in the condition (PNB) described by the ambulance drivers. The late Mr. Phillips suffocated to death on the floor of the Ambassador hotel.

The deceased plaintiff, Mr. Phillips, does not argue that the act of handcuffing him, and placing him face-down on the ground was improper. Rather, he contends that what the police officers did, or failed to do, once he was restrained constituted "excessive force". Although difficult to conceptualize, the late Mr. Phillips' contention is that the officers' failure to act, after he was restrained, constituted "excessive force". The only question is whether the officers were

unreasonable in their handling of Mr. Phillips once his hands were cuffed behind his back and he was placed, face-down, on the floor. Considering the totality of the circumstances, the late Mr. Phillips contends that the unreasonableness of the officers' conduct should be submitted to a jury.

This case affords this Court an opportunity to weigh its concerns for the preservation of human life and a litigant's meaningful day in court against its interests in resolving immunity questions at the earliest possible stage in the litigation and a speedy and inexpensive determination of lawsuits. It is important for this Court to emphasize to the 7th Circuit that, notwithstanding its preference to decide, as a matter of law, the issue of qualified immunity, even when the facts are in dispute (*See Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *see also Rakovich v. Wade*, 850 F.2d 1180, 1201 (7th Cir. 1988)), it is not free to abandon traditional summary judgment methodology that necessitates viewing the facts in a light most favorable to the non-moving party.

A. Factual Background -

On May 6, 1993, Mr. Phillips entered his hotel room and, among other alleged disorderly, and destructive conduct, began throwing the hotels fans out of the window. During the commotion hotel security and maintenance personnel did forcibly enter the room and did observe the plaintiff naked and visibly shaking. The hotel employees called the police and attempted to calm the plaintiff down. The employees then encouraged plaintiff to get dressed and to sit on the bed until the police arrived. They checked Mr. Phillips' overcoat to make sure that it did not contain any weapons. They noted the plaintiff appeared scared. When the police arrived, the plaintiff started shaking more and was sweating . After the initial verbal exchange between the two police officers and the plaintiff, plaintiff did remove his hands from his pockets and was observed clutching a ball-point pen in each hand. Even though plaintiff did not wield the pens in a threatening manner, the police, fearing for their safety, did

attempt to remove the pens from his hands. Officer Hintz grabbed one of plaintiff's wrists. Officer Riley grabbed the other. A physical struggle ensued. Apparently convinced that the plaintiff would not relent, the officers decided to force plaintiff to the floor by pulling his legs out from underneath him. Officer Riley enlisted the hotel employees' assistance. While the officers held onto plaintiff's wrists, one of the employees kicked plaintiff's feet out from underneath him and he crashed to the floor. Once on the floor, and again with the assistance of the hotel employees, the defendant police officers were able to affix handcuffs onto the plaintiff's wrists while his arms were behind his back. During the handcuffing procedure, Officer Riley put her knee in plaintiff's back, near the shoulder, and the hotel employee held down the plaintiff's other shoulder to prevent turning over or raising his head off of the ground. They used one set of handcuffs for each wrist and joined them together in the middle of plaintiff's back. The entire handcuffing process evolved while the plaintiff was face down on the ground.

While he laid on the floor, Officer Riley testified that she knew that, as a consequence of the physical struggle, plaintiff was having trouble breathing. During the ensuing five (5) minutes, the officers left Mr. Phillips' hands cuffed behind his back, lying face down on the floor.

During the period of time the plaintiff was lying on the floor, two (2) more officers arrived at the scene: Theodore Busch and Robert Duarte. Officer Busch applied shackles to plaintiff's feet within 30 seconds to a minute of his entering the room. At this point in time, the officers decided to call for an ambulance to transport plaintiff because they were afraid to transport him in a squad or a wagon.

Even though the officers testified that they "monitored" the plaintiff while he was on the ground, no-one said anything to him or attempted to move him into a different position, i.e., sitting or standing. Officer Hintz testified that Phillips was not monitored for any reason other than the officers' safety. Gary Kassin was the only

person who testified that while plaintiff was handcuffed on the ground, no-one touched him except to nudge him to make sure he was conscious. Officer Busch testified that he never saw anyone, other than himself to apply the leg irons, touch the plaintiff.

When the ambulance personnel, Mead and Schiellack, arrived they observed two officers standing towards the plaintiff's feet, talking with one another, another officer near the plaintiff's head and the plaintiff lying face down on the floor, motionless, with his hands cuffed behind his back and shackles affixed to his ankles. One of the police officers told them that the plaintiff was combative "...but he's much more relaxed now". Meade testified that it appeared to him that, upon his arrival in the room, the police did not realize that Phillips was not breathing. The ambulance attendant moved over to Mr. Phillips knelt down next to him and noted that he wasn't breathing and that he wouldn't respond to verbal questions. Mr. Meade then turned Mr. Phillip's head and noticed he looked very livid. He then attempted to detect a pulse and found none. Mr. Meade rolled the plaintiff onto his back and noticed his lips were blue and his eyes pupils were non-reactive. He announced to the officers that plaintiff was pulseless, non-breather (PNB). When he announced the plaintiff was PNB, Officer Riley asked him if the plaintiff was breathing, and another officer asked if the plaintiff had a pulse. Officer Busch testified that at no time prior to Mr. Meade's announcement, that the Mr. Phillips was PNB, did he know that the plaintiff was PNB . Officer Busch declared the room to be a potential crime (homicide) scene and cleared the room of all non-police personnel, including the ambulance drivers and hotel employees, and closed the door.

After non-police personnel were re-admitted into the room and feverish attempts were being made, by the paramedics, to revive Mr. Phillips, the defendant officers refused to make any statements to their department's Internal Affairs investigators concerning what had transpired in the room. The hospital personnel were given only a

general description, of unknown origin, of what had happened. The officers invoked their 5th Amendment right against self-incrimination during the inquest.

According to officers Riley, Busch and Duarte's testimony associated with this civil action, at all times they acted according to the prevailing Milwaukee Police Department's policy concerning handcuffing and transporting persons. They each testified that, on May 6, 1993, they could have safely placed Phillips into a sitting position at the point in time his hands were secured behind his back. They also testified that the department's policy has been amended since May 6, 1993 and, if confronted with the same situation, they would attempt to sit, or stand, the plaintiff once he was restrained.

The medical examiner who performed the autopsy, Dr. Jensen, testified that a person does not become a pulseless/non-breather unless that person is without oxygen for at least four (4) to six (6)minutes. Kream testified that a person who is without oxygen means a person who is not breathing. When presented with a hypothetical, on all fours with the facts at bar, Dr. Kream did opine that Mr.Phillips did suffocate to death. Those findings were substantiated during the subsequent autopsy. Dr. Jensen's inquest testimony revealed position asphyxia was a contributing cause of death. Dr. Jensen testified that, among other facts, the fact that he was: A) handcuffed with his hands behind his back, and B) face down on the floor, contributed to Mr. Phillips' death. Dr. Jensen went on and explained why being placed in the prone position, with his hands cuffed behind his back contributed to Mr.Phillips' demise. He stated:

> When an individual is in a downward position or anytime the body is in contact with another surface, it

> impedes respiration....And if the chest is pushed against a...floor, it impedes or it inhibits the ability of the chest to breathe in its normal fashion. In addition, with a...large abdomen, as that's pressed into the floor, the body organs and the additional fatty tissue have to go somewhere, or they are pushed up against the diaphragm, which also impedes the ability for the individual to breath. If there would have been pressure or some type of additional pressure or force behind or on top of the individual, that also would be a contributing factor. The ability of the individual to not be able to support themselves or to push themselves up, as if when they were handcuffed with their hands behind them, would allow more force to be pressed onto the chest.

Drs. Jensen and Kream's opinions were fortified by the following entry in the San Diego Police Department Task Force's report on in-custody, restraint-related deaths. It stated:

Our research indicated that restraint-related in-custody deaths are significant law enforcement problems nationwide. The Task Force relied on Dr. Reay, the author of R 19:Ex.B, in examining the role positional asphyxia played in in-custody deaths. The final Task Force report cited a 1991 article written by Dr. Reay, entitled "Positional Asphyxia During Law Enforcement Transport" that described "positional asphyxia occurs when the position of the body interferes with respiration, to breath. If there would have been pressure or some type of additional pressure or force behind or on top of the individual, that also would be a contributing factor. The ability of the individual

to not be able to support themselves or to push themselves up, as if when they were handcuffed with their hands behind them, would allow more force to be pressed onto the chest.

B. Whether, in the interest of resolving questions of immunity at the earliest stage in the litigation, the Seventh Circuit abandoned traditional summary judgment methodology and improperly engaged in resolving disputed facts in a light other than the one most favorable to the non-moving party?

Even though this Court has stressed the importance of resolving immunity questions at the earliest possible stage obligation, *Hunter v. Bryant*, 502 U.S. ___, 116 L.Ed.2d 589 (1991), a court may not abandon traditional summary judgment methodology when resolving disputed facts. In evaluating a motion for summary judgment, the Court must draw all inferences in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986). Summary judgment is appropriate if the materials in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party is entitled to such a judgment if, based on the evidence in the record, no reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52, 255 (1986).

Because the plaintiff died while in police custody on May 6, 1993, and cannot be heard to describe what occurred immediately prior to his death, that does not mean that there exist no disputed facts. There are facts, from independent sources, i.e., the ambulance drivers, the medical personnel that treated Mr. Phillips, the medical

examiner, and the officers' invoking their 5th Amendment right against self-incrimination, in this record that, when viewed in their proper light, support plaintiffs' assertion of genuine issues of material facts.

The disputed, material facts are:

1. Whether the police knew, or had reason to know, that Mr. Phillips was in an oxygen starved condition following the horrific struggle between himself, two hotel employees and two Milwaukee police officers? Notwithstanding two of the defendant officers' testimony wherein they both acknowledged being out of breath, and one of them seeing Mr. Phillips struggle to breath, the court of appeals found that "Placing Mr.Phillips in a prone position was reasonable under the circumstances." *Phillips*, 123 F.3d at 594. If viewed in a light most favorable to Mr. Phillips, the disputed testimony would be resolved to reveal that reasonable police officers would have, or should have, known that Mr. Phillips was in an oxygen starved condition following the horrific struggle between himself and two Milwaukee police officers.

2. Whether the police officers knew, or had reason to know, that their method of restraint exacerbated Mr. Phillips' oxygen deprivation? The testimony revealed that the officers were having trouble breathing, and that they noticed Mr.Phillips struggling to breath. The court of appeals found that placing Mr. Phillips in that position was reasonable under the circumstances. *Id.* In the light most favorable to the non-moving party, the disputed testimony would be resolved in favor of charging a reasonable officer with the knowledge that Mr. Phillips was having difficulty breathing as a consequence of the manner of restraint.

3. Whether the police officers knew, or had reason to know, that a person can sustain great bodily harm, or death, if not able to breath? The court of appeals' found restraining a person in a prone position, with constant monitoring, cannot be characterized in itself, as "deadly" force. *Phillips*, 123 F.3d at 593. If viewed in the light most favorable to Mr. Phillips, the resolution of the disputed facts would reveal that reasonable police officers did know, or should have known, that Mr. Phillips' difficulty in, or inability to, breath may result in great bodily harm or death.

4. Whether the police officers monitored Mr. Phillips for his safety, as he lain prone, with his hands cuffed behind his back, on the ground? The unequivocal testimony of the defendant Busch was the officers were monitoring Mr. Phillips for their own safety. Further, the other officers testified that no-one said anything to him or attempted to move him while he was cuffed, on the ground. Lastly, the ambulance drivers testified that they informed the officers that Mr.Phillips was PNB after they observed him to be very livid, not breathing, unresponsive, with blue lips and eyes that had become fixed and dilated. Notwithstanding the uncontradicted evidence, the court of appeals found that the officers were constantly monitoring Mr. Phillips and that the factors that contributed to his death were not detectable by the naked eye. *Id.* If viewed in a light most favorable to Mr. Phillips, resolution of the disputed testimony would reveal that, once handcuffed and placed on the ground, the officers did not monitor Mr. Phillips for his safety and that the absence of breathing and its affect on Mr. Phillips' appearance, was observable to the naked eye.

5. Whether the gravity of Mr. Phillips' condition was observable to the naked eye? In the face of the plaintiffs' submissions that established Mr. Phillips did not draw a breath for 4-6 minutes prior to the arrival of the ambulance attendants and that, upon their

entry into the room, the ambulance attendants observed Mr. Phillips was not breathing, he was very livid, his lips were blue, he was unresponsive and his eyes were fixed and dilated, the court of appeals found that the officers were constantly monitoring Mr. Phillips and that the contributing factors to his death were not observable to the untrained eye. Phillips, 123 F.3d at 593. In a light most favorable to Mr. Phillips, the reasonable inference to be drawn from the testimony is that the officers could not have been monitoring Mr. Phillips for his safety.

6. Whether reasonable police officers would have rolled Mr. Phillips onto his side, placed him in a sitting position or stood him up, to accommodate easier breathing? Officer Busch testified that they could have rolled him onto his side or into a sitting position. The court of appeals found that it would have been dangerous for the police to roll Mr.Phillips over onto his side or into a sitting, or standing, position. Phillips, 123 F.3d at 594. If viewed in a light most favorable to deceased, the evidence would be permit the finding that once Mr. Phillips was restrained, with his hands cuffed behind his back, reasonable police officers would have safely rolled Mr. Phillips into a different position to accommodate better breathing.

7. Whether the defendant police officers bore any animus against Mr. Phillips due to Mr. Phillips' non-cooperation? Notwithstanding the officers' protestations to the contrary, in a light most favorable to the deceased plaintiff, it is reasonable to infer that, under the circumstances, the officers' inaction was a product of their anger after struggling with the uncooperative Mr. Phillips. *See Scott v. United States*, 436 U.S. 128, 139, n.13, 98 S.Ct. 1717, 1724, n.13, 56 L.Ed.2d 168 (1978)(in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a fact finder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen).

8. Whether the cause of death was suffocation? The uncontradicted medical testimony identified suffocation as the cause of Mr.Phillips' demise. Plaintiff, also, submitted the San Diego Police Department Task Force report on in-custody, restraint-related deaths that described numerous instances of in-custody restraint-related deaths, similar to Mr. Phillips', that were occasioned by positional asphyxia, the condition that occurs when the position of the body interferes with the ability to breath. Additionally, the medical examiner that performed the autopsy on Mr. Phillips agreed and testified that Mr. Phillips' suffocation was caused by the manner of restraint. The court of appeals cited an enlarged heart (his heart wasn't enlarged according to the radiologist who examined Mr. Phillips in the
emergency room), an enlarged thyroid, Graves' disease and a thyroid storm, as contributing factors in Mr. Phillips' death. *Phillips*, 123 F.3d at 594. In a light most favorable (but, nonetheless, perverse) to the deceased plaintiff, the conflicting evidence would be interpreted to be that he suffocated to death on the hotel floor and that had the police changed the position of his body, i.e., to take his body weight off of his lungs, he would not have died.

9. Whether each of the defendant police officers' decision to not make any statements to the Internal Affairs investigators, and to invoke their 5th Amendment right against self incrimination, at the District Attorneys' inquest, constituted an admission against interest? The court of appeals ignored this issue. If viewed in a light most favorable to the plaintiff, the invocation of the 5th Amendment right against self-incrimination would be construed as an admission against the defendant police officers' interests. *See Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810(1976).

Notwithstanding the Court's desire to resolve the immunity question at the earliest stage of the controversy, if the totality of the evidence is viewed in the light most favorable to the deceased plaintiff, it cannot be said, as a matter of law, that the defendant

police officers acted reasonably under the circumstances. Therefore, the controversy should be submitted to a jury.

C. Whether The Seventh Circuit Erred When, At The Summary Judgment Stage Of The Litigation, It Refused To Characterize The Police Officers' Application Of Force As "Deadly" For The Purpose Of Assessing That Component Of Mr. Phillips' Fourth Amendment Claim?

For an application of force to be classified as "deadly force", it must at least carry with it a substantial risk of causing death or serious bodily harm. *See Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50 (7th Cir. 1994)(It was appropriate to evaluate police officer's alleged conduct in backing his squad car into the path of a speeding motorcycle to block its movement as application of deadly force). The defendants do not assert that they ever had the right to use "deadly force" against Mr. Phillips. They deny that they did use "deadly force".

The court of appeals held, as a matter of law, that because "...it was reasonable to place Mr. Phillips on the floor in a prone position...", the officers did not use "deadly" force to restrain Mr. Phillips. The court continued to state: "...restraining a person in a prone position, with constant monitoring, cannot be characterized, in itself, as 'deadly' force." *Phillips*, 123 F.3d at 593-594. The necessary corollary of the court of appeals' reasoning mirrors Mr. Phillips' argument: that, absent constant monitoring, maintaining Mr. Phillips in a prone position did create a substantial risk of causing death or serious bodily harm.

If the evidence is viewed in the light most favorable to Mr. Phillips, a genuine, material issue is whether the police officers ever monitored Mr. Phillips for his safety. Further, even if it is determined

that the police officers did monitor Mr. Phillips, the reasonableness of their monitoring, under the circumstances, is a genuine, material issue.

The supportive evidence is that Mr. Phillips was placed in the prone position, with his hands cuffed behind his back, while he was in an oxygen starved condition. Further, the officers who struggled with him were having difficulty breathing as a consequence of the struggle. One of the officers noticed Mr. Phillips having difficulty breathing while he was restrained on the floor. No-one said anything to him until the ambulance drivers were in the hall. Mr. Phillips never said anything to the officers. Noone touched, or attempted to move him. When the ambulance drivers arrived in the hotel room, one of the officers told them that Mr. Phillips had been combative but that he was much more passive now. The ambulance drivers observed Mr. Phillips lying motionless on his face, with his hands cuffed behind his back. When the ambulance driver approached Mr. Phillips, he rolled him over and discovered that he was not breathing, did not have a pulse, his lips were blue and his eyes were fixed and dilated. The ambulance driver's announcement that Mr. Phillips was a pulseless non-breather was the first the officers knew of Mr. Phillips' grave physical condition. A person does not become a pulseless non-breather unless that person has not drawn a breath for 4-6 minutes. When the ambulance driver announced Mr. Phillips' fatal condition to the police officers, Officer Busch cleared the room of all non-police personnel and closed the door. When the Milwaukee Police Department Internal Affairs investigators arrived on the scene, the defendant police officers refused to make any statements concerning what happened prior to Mr. Phillips' demise. At the inquest into the events surrounding Mr. Phillips' death, the defendant police officers invoked their 5th Amendment rights against self-incrimination.

Even though, as the court of appeals noted, there is no proof that the officers hog-tied, choked or transported Mr. Phillips (Phillips,

123 F.3d at 594), there exists a genuine, material issue whether the force they did apply in their manner of restraint, and their failure to respond to Mr. Phillips' plight, constitutes "deadly force".

D. Whether The Fourteenth Amendment To The United States Constitution Imposed Upon The Defendant Police Officers An Affirmative Duty To Protect Mr. Phillips From The Danger Of Suffocation Attributable To Their Manner Of Restraint?

In reliance on this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989) the court of appeals ruled, as a matter of law that the Fourteenth Amendment does not apply to the facts at bar. It stated: "Therefore, although ' it is true that at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause (and after conviction to the Eighth Amendment's cruel and unusual punishments clause...)," *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988), that point was not crossed in this case, and the Fourth Amendment's reasonableness standard remains the sole standard by which to measure the officers' actions. *Phillips*, 123 F.3d at p.593.

After the seizure of Mr. Phillips occurred, when the defendant police officers took Mr. Phillips into custody, handcuffed his hands behind his back and placed him face-down on the ground, their actions prevented Mr.Phillips from exercising the most basic human need, the need to breath. In such an instance, the Constitution imposes upon those officers a corresponding duty to assume some responsibility for his safety and general well-being. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989). The Court in *DeShaney* explained its rationale: "...when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders unable to provide for his basic

human needs - e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause....*citations omitted* The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *citations omitted*...In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf- through incarceration, institutionalization, or other similar restraint of personal liberty- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause...". *DeShaney*, 489 U.S. at p.200.

The Due Process Clause protects pretrial detainees both from deliberate exposure to harm and from failure to protect when the government learns of a strong likelihood that the detainee will be harmed. *See Anderson v. Gutshenritter*, 836 F.2d 346, 349 (7th Cir. 1988) *citing Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984). To prevail on a Fourteenth Amendment claim, Mr. Phillips must prove that the defendant police officers acted deliberately or with callous indifference, evidenced by actual intent to violate Mr.Phillips' rights or reckless disregard his rights.

In the light most favorable to Mr. Phillips, the evidence shows that the seizure concluded at the point in time that Mr. Phillips was left face-down on the ground with his hands bound behind his back. The evidence further shows that Mr.Phillips was in an oxygen deprived state attributable to the struggle with the police and that the officers were aware of his condition. That struggle may be determined by a reasonable fact-finder to be the source of the officers'

ill-will toward Mr. Phillips. As a consequence of the manner of restraint, Mr. Phillips was unable to move his body into a position to accommodate his ability to breath. The officers did not assist him. Even though, Mr. Phillips physical appearance bore indicia of a life-threatening condition, i.e., lividity, blue lips, fixed and dilated pupils, non-breathing and unresponsiveness, the officers did nothing. A reasonable jury could find that the police failed to monitor Mr. Phillips for his safety. Mr. Phillips suffocated to death, in that position, after not having drawn a breath for at least 4-6 minutes. When the officers were requested to explain what happened, each of the officers invoked their 5th Amendment right against self incrimination. That evidence, when taken as a whole, provides a sufficient basis upon which a jury could reasonably find that the point between a seizure and continued confinement had been crossed and reach a verdict in favor of Mr. Phillips on Fourteenth Amendment grounds.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted

Thomas E. Hayes

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ESTATE OF JAMES PHILLIPS III and,
RAYE M. PHILLIPS, Special Administratrix
of the Estate of JAMES PHILLIPS III, and
on her own behalf,

Plaintiffs, Case No.: 94-C-0999

v.

CITY OF MILWAUKEE,
PHILIP ARREOLA,
THEODORE BUSCH,
ROBERT DUARTE,
DENNIS HINTZ,
MARY RILEY,
JAMES RICE, and
HAROLD RAY SCHMIDT,

Defendants.

DECISION AND ORDER

Before the Court is Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. On November 1, 1995, the Estate of James Phillips, III and Raye M. Phillips filed a Motion for Partial Summary Judgment. On November 15, 1995, the City of Milwaukee, Police Chief Philip Arreola, and Milwaukee Police Officers Theodore Busch, Robert Duarte, Dennis Hintz and Mary Riley, filed a Motion for Summary Judgment. For the reasons that follow, the Court concludes that Milwaukee Police Officers Busch, Duarte, Hintz and Riley are entitled to dismissal from suit under the doctrine of qualified immunity and that plaintiff has failed to establish a deprivation of a constitutional right or a policy or custom to support the theory that the City of Milwaukee and its

Police Chief may be held liable in this cause of action. Therefore, the Court denies plaintiff's Motion and grants defendants' Motion.

I. PROCEDURAL BACKGROUND AND FINDINGS OF FACT

This lawsuit results from events that occurred at the Ambassador Hotel in Milwaukee, Wisconsin on May 6, 1993. By way of brief background, on May 6, 1993, Milwaukee Police Officers were called to the Ambassador Hotel in order to remove Mr. James Phillips, III, who had been asked to leave the hotel but had reentered his room. The police officers attempted to engage Mr. Phillips in conversation but he was noncommunicative and clenched two pens in his hands. The officers attempted to remove the pens from Mr. Phillips but he resisted and the police officers brought Mr. Phillips to the ground, handcuffed him behind his back and determined that he should be transported to the Milwaukee County Medical Complex for medical observation. While Mr. Phillips was on the floor, handcuffed and face-down, he stopped breathing. The police officers attempted to perform emergency rescue procedures and when ambulance personnel arrived on the scene, they continued with the emergency procedures and transported Mr. Phillips to Sinai Samaritan Hospital. Mr. Phillips died the next day.

Mrs. Phillips, as special administratrix of the estate of James Phillips, her son, and on her own behalf, brought suit against the City of Milwaukee, a municipality, Police Chief Philip Arreola, and Police Officers Theodore Busch, Robert Duarte, Dennis Hintz and Mary Riley. Mrs. Phillips also named in her complaint as defendants, James Rice and Harold Ray Schmidt. Mrs. Phillips brought a civil rights action under 42 U.S.C. Section 1983 charging the police officers with misconduct in handcuffing Mr. Phillips and leaving him face down, without adequate supervision, and argues this misconduct was deliberate, intentional, malicious, willful and wanton and violated Mr. Phillips' rights under the Fourth and Fourteenth Amendment of the United States Constitution. Furthermore, the Complaint argues that Police Chief Arreola did not provide the police officers adequate training and supervision which reflected a reckless disregard and/or deliberate interference toward Mr. Phillips. Finally, Mrs. Phillips

brings pendent state law claims charging wrongful death, battery and a survival action.

On November 1, 1995, the plaintiff filed a Motion for Partial Summary Judgment contending that the policies and procedures implemented by the City of Milwaukee and Police Chief Arreola regarding restraining and transporting of individuals constituted unconstitutional municipal policies as a matter of law, and that the unconstitutional policies violated the constitutional rights of Mr. Phillips causing the deprivation of life and liberty without due process of law, cruel and unusual punishment and an unreasonable search and seizure. On November 15, 1995, the defendants' filed a Motion for Summary Judgment arguing that the police officers are entitled to dismissal from this lawsuit under the doctrine of qualified immunity and that the plaintiff has failed to assert an actionable training and supervision claim against the City of Milwaukee and Police Chief Arreola. The defendants responded to plaintiff's Motion for Partial Summary Judgment on December 1, 1995, contending that the policies, practices and procedures of the Milwaukee Police Department, including its training of officers, are constitutionally sound and hand no causal relationship to any injuries sustained by Mr. Phillips. The plaintiff requested and was granted an extension to respond to defendant's Motion for Summary Judgment, and responded on January 2, 1996. Plaintiff submitted a Reply Brief in Support of Plaintiff's Motion for Partial Summary Judgment on January 2, 1996. On January 19, 1996, the defendants filed a Reply Brief in Support of Motion for Summary Judgment. Therefore, the case is fully briefed and ready for review by this Court.

This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. Sections 1331 and 1343. The Eastern District of Wisconsin is the proper venue for this cause of action because the claims arise entirely within the geographical boundaries of the Eastern District, in compliance with 28 U.S.C. Section 1391(b).

The Court notes at the outset that factual disputes do not preclude summary judgment based on qualified immunity. The Court must consider factual disputes in a light most favorable to the plaintiff, the nonmoving party, and decide whether, under those facts,

defendants' conduct violated law clearly established at that time. Moreover, pursuant to Local Rule 6.05(d), when the nonmoving party fails to respond to the moving party's proposed findings of fact and fails to introduce any evidentiary material, the Court will adopt the factual findings proposed by the moving party. The nonmoving party cannot generally object to the moving party's proposed findings of fact. Rather, the nonmoving party must specifically respond to each disputed finding of fact supported by evidentiary material. See Langenfeld v. Stoelting, Inc., 902 F.Supp. 847, 849 (E.D. Wis. 1995).

The Court's findings of fact are the following. Mr. Phillips had stayed at the Ambassador Hotel on occasion. According to Rick Scott, the general manager of the Ambassador Hotel, Mr. Phillips had engaged in "strange" behavior while a resident at the hotel. For example, Mr. Phillips had placed furniture and clothing in the hallway outside of his room, stuffed his clothing in this bathtub and then proceeded to fill the bathtub with water to the point of overflowing, and threw a chair out of his hotel window. (Scott Depo. at 9-11.) Scott observed that Mr. Phillips' personal hygiene habits were deteriorating and that his room was in a state of disarray with furniture overturned and the carpeting soaked with water from the bathroom. (Scott Depo. at 27-28, 38.) Consequently, Scott determined that Mr. Phillips would be asked to leave the hotel. (Scott Depo. at 38.) While the record is not entirely clear, apparently, Mr. Phillips was asked to vacate his room, room 316, but returned on May 6, 1993, and unbeknownst to the hotel management, reentered his room. Mr. Scott arrived at the hotel around 9:00 a.m.on May 6, 1993, and was informed by Gary Kassin, a security guard at the hotel, that Mr. Phillips was found in his room, attempting to barricade himself in, when housekeeping entered the room to check the condition of the carpeting. (Defendants' Proposed Findings of Fact (DPFOF) Paragraph 17; Scott Depo. at 12-13.) While Mr. Kassin was working at the hotel, the head of housekeeping informed him she attempted to check on the condition of the carpeting in room 316 but that there was a naked man in the room and she was scared. (DPFOF Paragraphs 20-22; Kassin Depo. at 14.) Mr. Kassin stated that he knew Mr. Phillips, was aware that he had been occupying room 316, and went to the room where he attempted to coax Mr.

Phillips to unlock the door. Mr. Phillips indicated to Kassin that he had paid his rent and wanted to be left alone. Mr. Kassin had another security guard, James Rice, cut the chain on the door and entered the room where he found Mr. Phillips wearing a trench coat, but otherwise naked, and shaking, and noticed further damage to the room. Mr. Kassin asked Mr. Phillips to put on his pants, radioed down to the desk on his walkie-talkie to call the police and sat and waited with Mr. Phillips. (Kassin Depo at 14-18).

On Thursday, May 6, 1993, at approximately 8:40 a.m., Officers Hintz and Riley received a dispatch to meet a security guard at the Ambassador Hotel regarding trouble with a customer. (DPFOF Paragraph 78; Hintz Interrog. at 5; Riley Interrog. at 5.) The desk clerk at the hotel informed the officers about the circumstances leading to the eviction of Mr. Phillips from the hotel and that Mr. Phillips had returned to room 316 and was acting strangely. (DPFOF Paragraph 80.) The officers emerged from the elevator on the third floor and were met by hotel security who corroborated the "strange" behavior of Mr. Phillips. (DPFOF Paragraph 81.) Upon entering the room, Officer Hintz observed Mr. Phillips wearing a trench coat, no shirt, and trousers that were about to fall down; he appeared unkempt and his clothing was soiled. Mr. Phillips was shaking and sweating. (Plaintiff's Proposed Findings of Fact (PPFOF) Paragraph 43.) Officer Hintz walked to the window and observed two fans lying on the parking lot. Officer Hintz asked Mr. Phillips his name, identification and what was "going on" and received no response. The officer asked Mr. Phillips to pull up his pants, and Mr. Phillips complied. (Hintz Interrog. at 5-6.) The observations of Officer Hintz are corroborated by Officer Riley who additionally observed the room in a general state of disarray and asked Mr. Phillips for identification, but Mr. Phillips responded unintelligibly to questions. (Riley Interrog. at 6-7.) Officer Hintz was warned by one of the hotel staff to be careful because Mr. Phillips had a ball point pen in each of his hands (DPFOF Paragraph 93; Hintz Interrog. at 6-7.) Officer Hintz, fearing for the safety of himself and others, grabbed Mr. Phillips' left hand and Officer Riley grabbed his right hand and told Mr. Phillips to drop the pens, but Mr. Phillips resisted and started to struggle and break away. (Hintz Interrog. at 6.) Hintz told Officer Riley to put Phillips or the bed in

order to control him and without anyone getting hurt, but Phillips became "extremely violent." (Hintz Interrog. at 6.)

Mr. Phillips became extremely violent, began thrashing his arms and pulling his shoulders and upper body and was attempting to kick, and tried to bite Officer Riley. (Hintz Interrog. at 7.) Officers Hintz and Riley brought Mr. Phillips to the floor with the help of the hotel staff. The hotel staff held Mr. Phillips legs, while the officers handcuffed Mr. Phillips with two pair of cuffs due to the size of Mr. Phillips. (Hintz Interrog. at 7.) After being cuffed, Mr. Phillips continued to struggle and kick violently , and Officer Hintz decided Mr. Phillips was a person in need of mental observation at a hospital. He used his radio to call for patrol, however, Mr. Phillips continued to struggle and Officer Hintz then decided to call for an ambulance in order to secure Mr. Phillips to a stretcher which would protect him from any injuries he might sustain in the back of a patrol wagon. (Hintz Interrog. at 7; Busch Interrog. at 6.) Officer Riley corroborates these events and added that she requested one of the hotel staff to pull Mr. Phillips' legs out from underneath him in order to bring him to the ground. (PPFOF Paragraph 15.) Additionally, Officer Riley put her knee on Phillips' right shoulder blade in order to prevent him from turning over and kicking. (Riley Interrog. at 8; PPFOF Paragraph 46.) Mr. Kassin corroborates Officers Hintz and Riley and added that the officers were telling Mr. Phillips that everything would be okay and that they were just going to take him out of the hotel. (DPFOF Paragraph 99; Kassin Depo. at 21.) According to Kassin, the officers used a "fine" tone of voice, did not yell, shout or use obscenities and tried to help Phillips. (Kassin Depo. at 21.)

Officer Riley estimated that Mr. Phillips was in a face-down handcuffed position for approximately one minute before Officer Duarte arrived as backup. (DPFOF Paragraph 116.) When Officer Duarte arrived he observed the two police officers restraining a black male who was on his stomach, and Officer Duarte began controlling Mr. Phillips feet to prevent him from kicking. (Duarte Interrog. at 6-7; Hintz Interrog. at 7.) Officer Duarte called for an ambulance to transport Mr. Phillips pursuant to Officer Hintz's request. (Duarte Interrog. at 7; Hintz Interrog. at 7.) Officer Busch arrived with leg

shackles and put them on the ankles of Mr. Phillips who continued to move his legs. (Busch Interrog. at 5; Hintz Interrog. at 7; Duarte Depo. at 21.) After a few minutes, Mr. Phillips began to calm down and the officers heard the ambulance crew arrive in the hallway. (Hintz Interrog. at 7.) Officer Hintz informed Mr. Phillips that an ambulance had arrived to take him to the hospital, thinking Mr. Phillips would remain calm if he knew he was not going to jail. (Hintz Interrog. at 7.)

The testimony of the police officers, ambulance attendants and witness is not entirely clear regarding exactly who determined Mr. Phillips was a pulseless nonbreather. Two police officers testified that a police officer rolled Mr. Phillips over, but he did not respond and Officer Duarte checked for a pulse but could not find one. (Hintz Interrog. at 7.) Officer Busch and ambulance attendant Edward Meade testified that the ambulance attendants determined Phillips was no longer breathing. The Court will interpret the facts in a light most favorable to the plaintiff, finding that the ambulance attendant, upon arriving on the scene, determined that Mr. Phillips was a pulseless nonbreather. (PPFOF Paragraph 20.) Edward Meade and Jay Schiellack, the ambulance attendants, arrived on the scene. They arrived within approximately four minutes of receiving the dispatch to transport a subject for mental observation. (DPFOF Paragraphs 145-46; Meade Depo. at 11.) A period of 30 seconds to one minute transpired from when Busch applied the leg restraints and when the ambulance arrived in the room. (Busch Depo. at 11.) Mr. Meade observed the MPD officers near Mr. Phillips who was in a prone position, he received some basic information from the officers and attempted to ask Mr. Phillips a question, however, Mr. Phillips did not answer; the time that elapsed was "no longer than a minute and a half." (PPFOF Paragraph 21; Meade Depo. at 16,40.) The ambulance attendants were informed that Mr. Phillips had violently struggled but was now more calm and more relaxed. (PPFOF Paragraph 54; Schiellack Depo. at 24-25.) Mr. Meade knelt down next to Mr. Phillips, could not see him breathing and could not find a pulse on his wrist or jugular. (PPFOF Paragraph 55.) Mr. Meade had the police officers help roll Mr. Phillips over onto his back and noticed that his pupils were nonreactive, felt his chest for any breathing and there was none and made the decision that Mr. Phillips

was a pulseless nonbreather. (Meade Depo. at 17.) Meade left the room to get additional equipment and called paramedics, and when he returned to the room the officers had removed the handcuffs, and there was a handkerchief over Mr. Phillips mouth and it appeared to Meade that an officer had been performing mouth to mouth on Mr. Phillips. (Meade Depo. at 20-1.) During the time period that the ambulance attendants left to get additional equipment, the police officers began administering CPR, Officer Duarte did the breathing and Officer Busch performed the chest compressions. (Busch Depo. at 35-36; Duarte Depo. at 14-17.) When the ambulance technicians returned, they continued administering CPR and other chest compressions. (Meade Depo. at 25; Schiellack Depo. at 11.) During the administration of CPR on Mr. Phillips, Officer Busch designated the area a "possible" crime scene and ordered non-police personnel out of the room. (PPFOF Paragraph 22; Busch Depo. at 8.) After a few minutes, one of the police officers replaced one of the ambulance technicians and continued administering CPR. (Meade Depo. at 26.) The paramedics arrived after several minutes and took over the care of Mr. Phillips. (Meade Depo. at 26; DPFOF Paragraph 155.) Mr. Phillips regained a pulse. (Schiellack Depo. at 26.)

Mr. Phillips was conveyed for treatment to Sinai Samaritan Hospital. (DPFOF Paragraph 159.) The admitting diagnosis for Mr. Phillips was a status of pulseless non-breather with subsequent advanced life support and resuscitation. (Kream Depo. at 5.) Mr. Phillips was pronounced dead at 2:50 p.m. on May 7, 1993. (DPFOF Paragraph 177.) Mr. Phillips' primary physician was Dr. Steven Kream; his final diagnosis of Mr. Phillips' condition involved and included cardiac arrest, anoxic encephalopathy/probable brain death, thyroid storm, Grave's disease and schizophrenia. (Kream Depo. at 6.) Dr. Kream characterized these conditions as Kream cannot state whether Phillips' heart stopped first, and then his breathing, or whether Phillips' breathing stopped first, and then his heart. However, his impression was that he had some type of cardiopulmonary arrest and a contributing factor to the cardiopulmonary arrest was the overactive thyroid gland, although it is difficult to specify the exact etiology. (DPFOF Paragraph 27.) According to Dr. Kream, when a person experiences a "thyroid storm," his body experiences severe over activity, including the

nervous system and the heart. The body is "revved up," and the person can experience fast speech, rapid pulse, rapid respirations, sweating and running around, and a person can die as a result of a thyroid storm. (DPFOF Paragraph 166; Kream Depo at 13, 24-25.)

On or about May 8, 1993, Dr. Jeffrey Jentzen, the medical examiner for Milwaukee County, and Dr. Stormo conducted the autopsy of James Phillips, III. (Jentzen Depo. at 3.) Mr. Phillips was five feet, six inches tall and weighed 229 pounds. He was described by Dr. Jentzen as an obese individual, of short stature, who had a neck that was extremely short and thick. (DPFOF Paragraph 1; Jentzen Depo. at 7.) Mr. Phillips had a pre-existing history of severe schizophrenia and suffered from Graves disease, also referred to as hyperthyroidism (DPFOF Paragraphs 2-3.) According to Dr. Jentzen, Graves disease can cause a hyperthyroid condition which can create, inter alia, an abnormal heart rhythm, tachycardia, and an intolerance to heat. (Jentzen Depo. at 15.) The gross examination performed by Dr. Jentzen of Mr. Phillips' indicated his heart was moderately enlarged and his thyroid gland was markedly enlarged due to the disease process. (DPFOF Paragraphs 5,7; Jentzen Depo. at 14.) The decedent's thyroid gland weighed 180 grams, while a normal thyroid gland weighs 30-60 grams. (Jentzen Depo. at 15-16.) It is Dr. Jentzen's opinion to a reasonable degree of medical probability that the decedent's enlarged heart was related to hypertension or high blood pressure related to his obesity and/or thyroid disease or idiopathic. (Jentzen Depo. at 31-32) Dr. Jentzen also opined that an individual, including a police officer, observing the decedent would not be able to note that the decedent had an enlarged heart, a diseased heart or an enlargement of the thyroid gland. (Jentzen Depo. at 21-22) Dr. Jentzen observed a pattern of abrasion around the decedent's wrist which was consistent with the action of fighting the handcuffs. (DPFOF Paragraph 180; Jentzen Depo. at 8, 10.) Furthermore, Dr. Jentzen observed an abrasion in the left facial area, which was consistent with a rug burn, and abrasions and a bruise to the right calf, which were consistent with the blunt trauma. (DPFOF Paragraph 181; Jentzen Depo at 11-12.) The autopsy did not reveal any external injury to the head, scalp or neck region, nor any evidence of bruising or bleeding in tissue, nor any hemorrhaging in body cavities which would indicate a suggestion

of trauma. (DPFOF Paragraphs 182, 185-86; Jentzen Depo. at 12-23) Dr. Jentzen did observe discoloration in the chest area, which was consistent with life support of resuscitation efforts. (DPFOF Paragraph 184; Jentzen Depo. at 11-12.)

Dr. Jentzen noted that the immediate cause of Phillips' death, as noted on the death certificate, was "sudden unexpected death associated with law enforcement restraint." This "cause of death" reflected the circumstances at the scene of Phillips' handcuffing, his clinical history, autopsy findings and the disease processes of the individual. (DPFOF Paragraph 188; Jentzen Depo. at 17-18.) In addition, Dr. Jentzen noted that Mr. Phillips was not taking his medications for his psychiatric problems. (DPFOF Paragraph 189.) Thus the manner of restraint, Phillips' obesity and other physical problems contributed to his death. (DPFOF Paragraph 191; Jentzen Depo. at 58-59.) Placing Mr. Phillips in a prone position with his hands handcuffed behind him may have been a contributing factor in Mr. Phillips' death. (Jentzen Depo. at 58.)

The police officers testified that at all times they acted in conformity with the prevailing Milwaukee Police Department (MPD) policy regarding handcuffing and transporting persons. (PPFOF Paragraph 51.) There is no specific MPD policy on the appropriate use of force when taking a person in need of mental observation into custody. (DPFOF Paragraph 31.) The general policy on the use of force in an arrest situation states "[a] law enforcement officer making an arrest is entitled to use whatever force is reasonably necessary, short of causing death or great bodily harm. Whether that force is reasonable depends upon the totality of facts and circumstances in each case. " (Defendants' Appendix at 21; Wisconsin Law Enforcement, Officers Criminal Law Handbook, at 14.) The totality of facts and circumstances include the known character of the arrestee, the risks and dangers faced by the officer or officers involved and any exigencies of the moment. (Id.) MPD officers are trained regarding the warning signs which could predict a possible assault upon officers and are trained regarding how to deal with an emotionally disturbed person. (DPFOF Paragraphs 35-36.) MPD officers are informed that emotionally disturbed individuals are dangerous because they are extremely strong, have a high pain

tolerance and perceive that they are fighting for their lives, furthermore, they are unpredictable. (DPFOF Paragraphs 37-38.) The training includes crisis intervention techniques including verbalization skills, how and why to take physical control of an individual and the monitoring of such an individual under physical control. (DPFOF Paragraph 39-40.) When taking a subject under physical control, MPD officers are instructed to bring the subject to the ground so as to avoid injury to either the subject or the officer. (DPFOF Paragraph 44.) And MPD officers are taught that the proper method of handcuffing is to handcuff an individual with his or her hands behind the back. (DPFOF Paragraph 45.) Once the subject is handcuffed, MPD officers are instructed to continue monitoring the subject and are trained to be aware of the tightness of handcuffs once applied. (DPFOF Paragraphs 47-48) Additionally, it is a MPD policy that leg restraints may be used to secure violent persons, including those placed under emergency detention. (DPFOF Paragraph 52.) And individuals in emergency detention must be transported via ambulance. (DPFOF Paragraph 55.) MPD officers are trained that they may engage in emergency detention procedures for subjects in need of mental observation. (DPFOF Paragraph 54.) MPD officers are trained in the areas of defense and arrest tactics, CPR recertification, first aid, human relations, handling the mentally ill, arrest, search and seizure, and handcuffing. (DPFOF Paragraph 59.)

On May 12, 1994, MPD amended its policy to require that officers use "caution and awareness" while constantly monitoring restrained individuals. (PPFOF Paragraph 6.) Additionally, as of May 12, 1994, MPD officers are required to roll a restrained person on his side, as soon as possible, to prevent injury and to facilitate officer monitoring and this policy was not in effect on May 6, 1993. (PPFOF Paragraph 7, 52.) This policy was first relayed via a roll call videotape presentation in April of 1993 which stated "[o]nce the subject has been controlled and handcuffed, the officer should roll the subject onto his/her side or into a sitting position as soon as possible." (DPFOF Paragraph 53; Appendix 1054.) The police officers were not disciplined by the MPD for their role in the May 6, 1 993 events at the Ambassador Hotel. (PPFOF Paragraph 59.)

II. LEGAL STANDARD

Summary judgment is no longer disfavored under the Federal Rules See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'"). Indeed, Federal Rule of Civil Procedure 56 requires a district court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; the requirement is that there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." Id. For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." Id.

The party moving for summary judgment bears the initial burden of showing that there are no material facts in dispute and that judgment should be entered in its favor. Hannon v. Turnage, 892, F.2d 653, 656 (7th Cir.), cert. denied, 498 U.S. 821 (1990). A defendant moving for summary judgment may satisfy this initial burden by pointing to a plaintiff's failure to introduce sufficient evidence to support each essential element of the cause of action alleged. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514; Celotex, 477 U.S. at 323-24, 106 S.Ct. at 2553. A party opposing a properly supported summary judgment motion "may not rest upon mere allegations or denials," but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Fed. R.Civ. P. 56(e). See also Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2554; Becker v. Tenenbaum-Hill Assoc., Inc., 914 F.2d 107, 110 (7th Cir.1990). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed.R.Civ.P. 56(e).

In evaluating a motion for summary judgment, the Court must draw all inferences in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 574, 106 S.Ct. 1348, 1356 (1986); Johnson v. Pelker, 891 F.2d 136, 138 (7th Cir. 1989). "However, we are not required to draw every conceivable inference from the record --only those inferences that are reasonable. " Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th Cir.1991)(citations omitted.)

III. ANALYSIS

A. Whether Police Officers Theodore Busch, Robert Duarte, Dennis Hintz, and Mary Riley are Entitled to Judgment as a Matter of Law under the Doctrine of Qualified Immunity.

The doctrine of qualified immunity provides that "government officials discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir.1994) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)), Qualified immunity is a judicially created doctrine intended to balance the citizen's statutory or constitutional right against the reality that few "persons will enter public service if such service entails the risk of personal liability for one's official decision." Donovan v. City of Milwaukee, 17 F3d 944, 947 (7th Cir.1994). As such, the doctrine provides an "*immunity from suit* rather than a mere defense to liability." Id. (quoting Mitchell v. Forsyth, 472 U.S.511, 526, 105 S.Ct. 2806, 2815 (1985) (emphasis in original). The availability of qualified immunity "turns on the 'objective legal reasonableness' of the actions taken by the defendants." Hall v. Ryan, 957 F2d 402, 404 (7th Cir.1992)(quoting Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987)). Moreover, "[a]ctions taken by local officials are considered objectively unreasonable only if the right allegedly violated is clearly established in a sufficiently particularized sense at the time of the actions at issue." Id.; Azeez v. Fairman, 795 F.2d 1296, 1301 (7th

Cir.1986)("The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful."). Thus qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096(1986).

When immunity from suit is sought by invocation of the doctrine of qualified immunity, the plaintiff has the burden of establishing the existence of a clearly established right. Liebenstein v. Crowe, 826 F.Supp. 1174, 1183 (E.D. Wis. 1992) (citing Able v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987)). That burden requires the plaintiff to "offer either a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts." Casteel v. Pieschek, 3 F.3d 1050, 1053 (7th Cir.1993)(citing Rice v. Burks, 999 F.2d 1172, 1173-74(7th Cir.1993)). See also McDonald v. Haskins, 966 F.2d 292 (7th Cir.1992)(holding a gun to the head of a child and threatening to pull the trigger is plainly excessive force, so closely analogous case is not needed to put police officer on notice). Examination of summary judgment motion based on the doctrine of qualified immunity requires a two-part analysis: (1) Does the alleged conduct violate the plaintiff's constitutional rights?, and (2) If those rights were violated, were the constitutional standards clearly established at the time in question? Sherman v. Four County Counseling Center, 987 F2d 397, 401 (7th Cir. 1993). A negative answer to the first question ends the inquiry. Siegert v. Gilley, 500 U.S. 226, 231-32, 111 S.Ct. 1789, 1793(1991).

All claims of excessive force by law enforcement officials are analyzed under the Fourth Amendment.[1] Lester v. City of Chicago,

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[1]The plaintiff has invoked the protections of the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment of the United States Constitution. The court will only apply the Fourth Amendment. "[A]ll claims that the law enforcement officers have used excessive force -- deadly or not --in the course of an arrest, investigatory stop or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its

830 F.2d 706, 710 (7th Cir. 1987); Liebenstein, 826 F.Supp. at 1180; Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1869 (1989). The Fourth Amendment provides persons with the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and this right extends to those persons suspected of actual or anticipated criminal wrongdoing. Even when there is no fullscale arrest made, the Fourth Amendment will apply to the officers' conduct as long as the suspect's freedom to walk away is restrained. Terry v. Ohio, 392 U.S. 1, 16, 88, S.Ct. 1868, 1877(1968). "[A]ll claims that law enforcement officers have used excessive force --deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham, 490 U.S. at 395, 109 S.Ct. at 1871. The plaintiff's Fourth Amendment rights are intact if a court finds that an officer's conduct was "objectively reasonable"in light of surrounding circumstances. Id. at 397, 109 S.Ct. at 1872. Such a determination involves balancing "the nature and quality of the intrusion of the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Lester, 830 F.2d at 711 (quoting Tennessee v. Garner, 471 U.S. 1,8(1985)). The surrounding circumstances which the Court should consider include,

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'reasonableness' standard, rather than under a substantive due process approach.'" Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1988)(making explicit what was implicit in Tennessee v. Garner where the complaint alleged violations of both the Fourth Amendment and the Due Process Clause and the Court analyzed the constitutionality of the challenged application of deadly force solely by reference to the Fourth Amendment). Additionally, the Court will not apply the Eighth Amendment's Cruel and Unusual Punishment Clause to the plaintiff's claims because the protections of the Eighth Amendment do not attach until after conviction and sentence. Ingraham v. Wright, 430 U.S. 651, 671, n.40, 97 S.Ct. with the contitutional guarantees traditionally associated with criminal prosecution).

but are not limited to, the crime's severity, whether the suspect poses an immediate threat to the officers or to others, and whether the suspect is resisting arrest or is fleeing arrest. Id. In judging the "reasonableness" of a particular use of force, the Court must consider "the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation. Graham, 490 U.S. at 396-97, 109 S.Ct. 1871-72. Therefore, in order to determine whether plaintiff states a Fourth Amendment cause of action, the Court must determine (1) if the police officers' conduct constituted a seizure and (2) whether the seizure was unreasonable. Donovan, 17 F.3d at 948. As this Court stated in Liebenstein, the legal standards governing the Fourth Amendment and the defense of qualified immunity are the same. The Fourth Amendment requires reasonable conduct on the part of police officers; qualified immunity gives the officer the benefit of the doubt when a civil action is undertaken. Liebenstein, 826 F.Supp. at 1184-85.

When reviewing a motion for summary judgment, the Court must interpret the facts in the light most favorable to the plaintiff, the non-movant, when supported by the evidence. The undisputed facts indicate that Mr. Phillips had been asked to leave the Ambassador Hotel and was subsequently found barricaded in his room by Mr. Kassin, a security guard at the hotel, and James Rice. Mr. Kassin described the condition of Mr. Phillips' room as a "disaster area" and informed Mr. Phillips that the police were called and waited with Mr. Phillips in his room. According to Mr. Kassin's uncontroverted deposition testimony, Officers Riley and Hintz arrived on the scene and attempted to engage Mr. Phillips in conversation and asked Mr.Phillips to remove his hands from his pockets. Mr. Phillips was unkempt, shaking, sweating and visibly scared. When Mr. Phillips took his hands out of his pockets, he had a pen clenched in each hand. According to Kassin, Phillips was not "threatening" but he "wasn't going to give [the pens] up to nobody." (Kassin Depo. at 19-20.) Mr. Kassin, a witness to what transpired, described the restraining of Mr. Phillips in his deposition:

(The police officers said) you're making this a lot harder on

yourself, just relax. They were talking -- trying to tell him things to do so that they could have got him down on the floor so he wouldn't get hurt or hurt himself because by the struggling he was doing, he wasn't, you know, he was doing more damage than the police officers were doing, you know, the way they brought him down, they were trying to help him you know, so he wouldn't hurt himself and they were just asking him to release the pen and to relax a little bit so they could get him -- get the pen out of his arm and get his hands back so they could cuff him.

(Kassin Depo. at 33-34.) The Officers each grabbed a hand of Mr. Phillips in order to release the pens and attempted to get him on the bed , but Mr. Phillips resisted. During the struggle that ensued and escalated, Kassin stated that the officers were telling Phillips "that everything was going to be okay, that they were just going to take him out of the hotel." (Kassin Depo. at 21.) Kassin's testimony is that Officer Hintz was "real nice about everything...he...wasn't shouting or yelling or anything" and the officers were "real calm with him, they were calling him by name." (Kassin Depo. at 21, 65.) Mr. Phillips continued to struggle and the officers were having trouble restraining him due to his obesity and strength.

Interpreting the facts in a light most favorable to plaintiff, a member of the hotel staff pulled Mr. Phillips' legs out from under him. Mr. Phillips continued to aggressively struggle. Once Phillips was on the ground, Officer Riley placed her knee on his back in order to get his arm back and handcuff him. Kassin stated that Officer Riley, for approximately thirty seconds, "had her knee like gently sitting on him so he couldn't raise up" but "didn't have her full weight on him because she almost lost her balance." (Kassin Depo. at 28,55.) Leg restraints were placed on Phillips and the decision was made by the police officers to call an ambulance because the officers were "afraid to take him in a squad car or in a paddy wagon because they were afraid he was going to hurt himself." (Kassin Depo. at 29.) After Phillips had been restrained and was face-down on the ground, Kassin testified that "we're all watching...constantly they're watching him because he was struggling so hard we knew he was tired, so we thought he was resting,...he was moving a little bit, but you could see

him breathing...everybody is watching him,...watching him laying on the floor." (Kassin Depo. at 30.)

The police officers did not use any type of racially derogatory language or unprofessional terminology toward Mr. Phillips. Moreover, the police officers exhibited appropriate techniques in bringing the struggling subject to the ground in order to handcuff him and remove the pens, which could have inflicted injury on himself, on the officers or on a member of the hotel staff. It is clear to the Court that pens in the hands of a strong individual, who is exhibiting bizarre and unpredictable behavior, could be used as potential striking weapons. The police officers did not strike, hit, punch, kick or use a baton or any other kind of weapon on Mr. Phillips. In fact, the record reveals that the police officers restrained Mr. Phillips as gently as possible, given Mr. Phillips' large size, initial recalcitrance and then violent behavior. Officer Riley testified that once Mr. Phillips was handcuffed, the officers removed forks from his pocket, (Hintz Interrog. at 7; Riley Depo. at 31) although Kassin did not observe the forks. Moreover, once Phillips was on the ground and handcuffed, the officers continued to monitor him by watching him and calling his name. There is no evidence, contrary to the plaintiff's conclusory allegation, that the police officers deliberately ignored Mr. Phillips. The police officers planned to take Mr. Phillips to a hospital instead of jail and ordered an ambulance so that he could be properly transported.

The time frame for how long Mr. Phillips was on the ground is not precise to the exact second, but the record reveals one or two minutes transpired between when Mr. Phillips stopped struggling and the ambulance technician arrived on the scene and determined he was not breathing. Kassin estimates it was a "minute or so" before the officers noticed Mr. Phillips was not breathing. (Kassin Depo. at 38.) The testimony of the police officers and witnesses is not entirely clear regarding the difference between the ambulance crew and the paramedics. Again, interpreting the controverted evidence in a light most favorable to plaintiff, according to Meade and Busch, when the ambulance attendance arrived, the ambulance attendants informed the police officers that Mr. Phillips was a "pulseless nonbreather." (Busch Depo. at 8.) The totality of testimony reflects that a private

ambulance service, Curtis-Universal, was called in order to transport Mr. Phillips to the hospital for mental observation. When the ambulance arrived, with emergency medical technicians, it was determined that Mr. Phillips was not breathing and consequently, the ambulance personnel returned to their rig to retrieve the proper CPR equipment and called Milwaukee Fire Department paramedics to assist. When the ambulance personnel left to return t their rig, Officers Duarte and Busch began performing CPR on Mr. Phillips. The ambulance personnel returned with the proper equipment and took over administering CPR. When the paramedics arrived from the Milwaukee Fire Department, they took over the administration of CPR and conveyed Mr. Phillips to the hospital. These events transpired within a matter of minutes.

The uncontroverted testimony of Kassin, a citizen witness, recounted a detail by the Court, is corroborated by the testimony of Rick Scott, Officers Hintz, Riley, Duarte, Busch and Meade, the EMT technician from the ambulance. The undisputed facts reveal that the police oficers restrained an individual who was unkempt and exhibiting bizarre behavior and tightly clenched two ball-point pens in his fist. Mr. Phillips was extremely resistant to the officers attempts, both verbal and physical, to release his grip on the pens. The more the officers tried to release the pens, the harder Mr. Phillips struggled. The Court finds that the police officers followed appropriate police procedures by first attempting to talk to Mr. Phillips and then followed appropriate police procedures in their restraining and handcuffing of Mr. Phillips given his violent struggle.

The Court concludes a Fourth Amendment seizure occurred when the police officers attempted to restrain Mr. Phillips. See Brower v. County of Inyo, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 1381 (1989) (holding a fourth amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied). However, the Court finds the seizure was not unreasonable. It was a reasonable responses of the officers to attempt to remove the pens from an individual as large and potentially unpredictable as Mr. Phillips. The officers response was a precautionary measure, appropriate in the context of the surrounding circumstances. Police officers faced with a mentally unstable

individual, with a recent history if bizarre behavior, should be able to assess the situation and intervene appropriately without fearing a lawsuit. The police officers realized that Mr. Phillips required mental observation due to his mental and physical condition and put in place the proper procedures to convey Mr. Phillips to the hospital via an ambulance instead of to jail. Once Mr. Phillips was restrained, he seemed to relax, clam down and stopped struggling. Within a matter of minutes, upon the arrival of the ambulance, it was determined that Mr. Phillips was not breathing. The police officers and ambulance personnel began administering CPR until the paramedics arrived and took Mr. Phillips to the hospital. Unfortunately, Mr. Phillips never recovered and died the next day.

Understandably, the plaintiff is searching for an explanation for the death of her son. However, the minor inconsistencies in the various affidavits and overall evidentiary material submitted do not raise a question of material fact as to whether the defendants exhibited excessive force or whether defendants had knowledge of or even a particular reason to expect that, once restrained, Mr. Phillips would no longer be breathing in a matter of minutes. The defendants' lack of knowledge and their exercise of reasonable precautions precludes any possibility of their actions being characterized as callous, deliberate, or criminally reckless. The MPD policy implemented on May 12, 1994 and first relayed via a roll call videotape on April, 1993 requires an officer to roll a restrained person on side, as soon as possible once the individual has been controlled, in order to monitor the individual. In the instant case, the officers experienced difficulty restraining Mr. Phillips due to his violent struggle, obesity and strength. Once he was restrained, the officers continued to monitor him as the ambulance arrived. The time that elapsed was a matter of minutes and the Court does not find that within those intervening minutes, the police violated Mr. Phillips' constitutional rights by not rolling him on his side or sitting him up, given his unpredictable behavior, prior violent struggle and attempt to injure the officers, and large size. Police officers facing unpredictable and oftentimes dangerous situations must be free to perform their duties utilizing their training, experience and good judgment with confidence that courts will not scrutinize their discretionary decisions with microscopic detail. Having analyzed the officers' conduct, the

Court concludes the police officers' actions were objectively reasonable. The doctrine of qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law," and it is clear from the record that under this standard, the Milwaukee Police Officers are immune from suit. Malley, 475 U.S. at 341, 106 S.Ct. at 1096.

The relevant question in this case is the objective, fact-specific question whether a reasonable officer could not have believed that handcuffing an individual behind his back and leaving him face down for no more than two minutes would lead to death. As articulated in Anderson v. Creighton, the right an official is alleged to have violated must have been "clearly established" in a particularized sense. Anderson, 483 U.S. at 640, 107 S.Ct. at 3038. When the police officers restrained Mr. Phillips, they abided by the policies and practices of the MPD, they had no reason to know or suspect that handcuffing an individual behind his back, face-down could possibly lead to death. Officials who act reasonably should not be held personally liable. Moreover, the Court concludes that the plaintiff has not met her burden of showing that the law was clearly established at the time of the incident so that the individual police officers should have known that they were violating Mr. Phillips' constitutional rights (which this Court has concluded) when they restrained him. The fact that MPD has since officially modified its policies is not dispositive, state officials are not required to predict the evolution of the law. See Smith v. Fruin, 28 F. 3d 646, 650 (7th Cir. 1994), cert. denied, 115 S.Ct. 735 (1995) (quoting Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir.1991)). Mrs. Phillips has failed to allege the violation of a constitutional right that was clearly established at the time of the police officer's actions and has also failed to establish the violation of any constitutional right at all. Although the end result of the police officers' encounter with Mr. Phillips was undeniably tragic, in analyzing the encounter step-by-step, the police officers, in reaction to Mr. Phillips' violent behavior, acted permissibly at every point. In conclusion, Milwaukee Police Officers Busch, Duarte, Hintz and Riley did not violate the constitutional rights of James Phillips and are dismissed from this lawsuit under the doctrine of qualified immunity. The plaintiff has failed to establish a genuine issue as to any material

fact, and therefore, defendants are entitled to judgment as a matter of law.

B. Whether the City of Milwaukee and Police Chief Philip Arreola are Liable under 42 U.S.C. Section .....1983.

42 U.S.C. Section 1983 provides a remedy against "any person" who, under color of state law, deprives another of rights protected by the Constitution.[2] This Court's determination that the individual police officers did not violate Mr. Phillips' Fourth Amendment rights necessarily renders moot the issue of whether the policies of the City of Milwaukee Police Department are unconstitutional. The Supreme Court set forth the elements of a civil rights claim against a municipality in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018 (1978). Under Monell, a plaintiff must show (1) that he or she has suffered a deprivation of a consitutionally protected interest, and (2) that the deprivation was caused by an official policy, custom or usage of the municipality. Id. at 690-91, 98 S.Ct. at 2036. "If a person has suffered no constitutional injury at the hands of the individual police officer(s), the fact that the department regulation might have authorized the [policy in question] is quite beside the point." City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573 (1986); see also Tom v. Voida, 963 F.2d 952, 962 (7th Cir.1992). Municipality liability does not attach unless the policy in question actually results in a constitutional violation. See City of Canton v. Harris, 489 U.S. 378, 389-92, 109 S.Ct. 1197, 1205-07(1989); Hirsch v. Burke, 40 F.3d 900, 904(7th Cir.1994). Therefore, because

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[2] The statute states in pertinent part: "Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. Section 1983.

the constitutional rights of Mr. Phillips were not violated, the policies of the City of Milwaukee Police Department need not be reviewed for their constitutionality. However, in the interests of completeness, the Court opts to offer such review.

A municipality is liable under 42 U.S.C. Section 1983 only if the constitutional deprivation flows from a policy or custom of the local government. Monell, 436 U.S. at 690-91, 98 S.Ct. at 2036. The failure to select or implement necessary practices can constitute a "policy or custom" for purposes of a Monell Section 1983 suit, if that failure causes a constitutional violation. Collins v. City of Harker Heights, 503 U.S. 115, 123-24, 112 S.Ct. 1061, 1067-68(1992). In order to prevail, the plaintiff must show that MPD's "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Canton, 489 U.S. at 388, 109 S.Ct. at 1204.

Plaintiffs argue in their Motion for Partial Summary Judgment and Response to defendants' Motion for Summary Judgment that defendants City of Milwaukee and Police Chief Philip Arreola's policies and procedures, regarding restraining and transporting individuals, constitute unconstitutional municipal policies and caused the death of Mr. Phillips. Plaintiff further contends that the MPD failed to adequately train its police officers with respect to restraining the mentally ill. The defendants contend that the City of Milwaukee and Police Chief Arreola were not deliberately indifferent with respect to the training and supervision of its officers and argue that the plaintiff has failed to plead facts to establish a policy or custom to support her theory that the City of Milwaukee may be held liable in this cause of action.

Deliberate indifference is an "elusive standard." Cornfield by Lewis V. School District No.230, 991 F.2d 1316, 1327 (7th Cir. 1993). Seventh Circuit case law makes clear that deliberate indifference is akin to intentional or criminally reckless conduct. Salazar v. City of Chicago, 940 F.2d 233, 237 (7th Cir.1991). However, the standard can be satisfied where "in light of the duties assigned to specific officers or employees the need for more or different training is [] obvious, and the inadequacy [] likely to result

in violation of constitutional rights." City of Canton 489 U.S. at 390, 109 S.Ct. at 1205. Therefore, municipal liability does not attach unless policy-makers "have actual or constructive notice that a particular omission [] is likely to result in constitutional violations." Cornfield by Lewis, 991 F.2d at 1327; Sims v. Mulcahy, 902 F.2d 524, 543 (7th Cir.), cert. denied, 498 U.S. 897 (1990) ("A plaintiff that faults a municipality's inaction must show that there is an "extremely high degree" of municipal culpability.").

In assessing the policies of the MPD, the plaintiff has failed to meet her burden of establishing that MPD failed to train its police officers and was deliberately indifferent in so failing to train, so that the City of Milwaukee may be held liable. All MPD officers are trained in how to deal with potentially emotionally disturbed individuals, the use of verbalization skills, taking emotionally disturbed individuals into custody for mental observation, handcuffing, use of force, and monitoring an individual when handcuffed. When Officer Hintz and Riley first encountered Mr. Phillips they spoke in a nonthreatening tone of voice and attempted to escort Mr. Phillips out of the hotel. The Officers determined that Mr. Phillips required mental observation and additionally that the pens he grasped in his hands should be removed because he could have harmed himself, the officers or employees at the Ambassador Hotel. Once the encounter turned violent due to the actions of Mr. Phillips, the officers responded appropriately and in compliance with MPD procedures in restraining and handcuffing Mr. Phillips. The testimony of Mr. Kassin attests to the fact that the officers attempted to restrain Mr. Phillips as carefully as possible taking into consideration his obesity, strength and unpredictable violent behavior. Once Mr. Phillips was restrained and on the ground, the police officers appropriately monitored him. He was not hog-tied, ignored or left in the back of a squad car or ambulance. Unfortunately , Mr. Phillips died while in police custody, and although the exact cause of death is not ascertainable, the autopsy reveals a number of contributing factors.

The plaintiff attempts to argue that the MPD in 1993 should have been aware of the potential for "positional asphyxia" and points to five in-custody restraint related deaths during a 28 month period

from 1990 through April 1992, "several other deaths" referred to in Deputy District Attorney Robert Donohoo's March 20, 1991 letter to Chief Arreola and a report from the San Diego Police Department discussing positional asphyxia. Thus the plaintiff argues that Police Chief Arreola should have immediately taught police officers to attempt to place a person on his side or in a sitting position once that person has been restrained and monitor that person's potential medical needs while in restraints. However, none of cases cited by plaintiff, which resulted in the death of an individual while in custody, are similar to Mr. Phillips' circumstances. For example, plaintiff cites to the August 31, 1990 in-custody restraint-related death of Mr. Nichols Elm, Sr.Mr. Elm died after he was arrested, handcuffed behind his back and placed face-down during transport to a hospital. The cause of death as ruled by the Milwaukee County Medical Examiner was "cocaine psychosis." (Appendix at 314.) Unlike Mr. Elm, who died during transport where the cause of death was cocaine-related, Mr. Phillips was found to be a pulseless nonbreather minutes after he was restrained, was never transported, and a medical autopsy revealed numerous factors that could have caused or contributed to his death. Of the four in-custody deaths referred to by plaintiff, defendants point out that one was the result of natural causes, one involved cocaine ingestion, and the remaining two were suicides. (Appendix at 450.) The Court concludes it is disingenuous to compare the death of Mr. Phillips with these other custody related deaths.

Plaintiff cites to a 1988 article by Dr. Reay entitled "Effects of Positional Restraint on Oxygen Saturation and Heart Rate Following Exercise" which assessed the effects on peripheral oxygen saturation and heart rate that positional restraint induces when a person is prone, "hog-tied" and placed in the back and then bending the individual's secured and shackled legs back in order to connect the handcuffs and shackles. Although "hog-tying" was not the critical issue, according to the article, being in a confined space is the problem with regards to positional asyphixia. (Appendix at 314.) In another article on positional asphyxia, Dr. Reay reported on three cases in total across the county where an individual, who was hog-tied and left in a confined space, died. (Appendix at 313, 314.) Mr. Phillips, however, was not hog-tied nor placed in a confined space,

and was watched by the police officers while they awaited the arrival of the ambulance. Plaintiff also cites to a study by the San Diego Police Department which established the Custody Death Task Force to study the issue of restraint-related in-custody deaths. Police Chief Arreola responded to the survey conducted by the study on behalf of the Milwaukee Police Department and received the results of the Task Force. The Court cannot find as a matter of law and contrary to the opinion of plaintiff's expert, D.P. Van Blaricom, that a report and an article discussing potential asphyxia were or are sufficient to put the City of Milwaukee, its Police Chief and Officers on notice that the procedures implemented to restrain Mr. Phillips would result in his death. The report of Dr. Reay and the study conducted by the San Diego Police Department discussed the use of hog-tying, the carotid artery choke hold as well as leaving restrained individuals unattended and in confined spaces, like the back of a police patrol car. None of those methods were employed on Mr. Phillips. As the defendants note in their Reply Brief, scholarly studies and articles do not establish the law.

The policies, procedures and training of the MPD were consistent with law enforcement standards approved of by the State of Wisconsin Department of Justice, Division of Law Enforcement Services and the Wisconsin Law Enforcement Standards Board. (Labecki Aff. Paragraph 5.) In the instant case, Mr. Phillips was properly handcuffed behind his back with two sets of handcuffs, while in a face down prone position on the floor. This practice was intended to ensure the safety to Mr. Phillips as well as the police officers and employees of the Ambassador Hotel. This police practice is standard across the country. Mr. Phillips was watched by police officers in the hotel room and within a matter of minutes stopped breathing. Because the police officers had already called an ambulance to transport Mr. Phillips to the hospital, the ambulance personnel were on site and immediately began administering CPR. The plaintiff has failed to assert a specific training deficiency, or enumerate a number of identified deficiencies, known to the City of Milwaukee and Police Chief Arreola, the municipal policymaker, which caused any constitutional deprivation. Moreover, the plaintiff has failed to identify a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge of the

conduct so pervasive as to imply actual or constructive knowledge of the conduct on the part of the City of Milwaukee and Police Chief Arreola. Finally, the fact the policies of the MPD have undergone revision does not indicate that preexisting policies were not constitutionally sound. The policies of the MPD were and are consistent with national and state law enforcement standards. The absence of allegations sufficient to establish a "direct causal link between a municipal policy or custom, and the alleged constitutional deprivation, "City of Canton, 489 U.S. at 385, 109 S.Ct. at 1203, clearly demonstrates that defendants City of Milwaukee and Police Chief Arreola are entitled to summary judgment as a matter of law.

C. Whether the moving defendants are entitled to summary judgment on the pendent state law claims.

The doctrine of pendent jurisdiction permits federal courts to assert jurisdiction over an entire action containing both federal and state claims. United Mine Workers of America v. Biggs, 383 U.S. 715, 86 S.Ct. 1130 (1966). The Court in considering whether to address state law claims must embark upon a two-step analysis: first, the federal and state claims must "derive from a common nucleus of operative facts" and be "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding;" second, courts are required to weigh case-by-case the values of convenience to the parties, fairness, judicial economy, and comity before deciding to exercise its jurisdictional power. Id., at 725, 86 S.Ct. at 1138. With the resolution of all of plaintiff's federal claims, it is within the Court's discretion to dismiss the remaining state law claims, however, dismissal is not required if the correct disposition of the pendent state law claims is clear as a matter of state law and addressing the claims would resolve the cause of action without further trial proceedings and without having to interpret any unsettled area of Wisconsin law. See Weinberger v. State of Wisconsin, 906 F.Supp. 485, 493 (W.D. Wis. 1995). Thus the Court opts to retain jurisdiction over the remaining state law claims in the interests of judicial economy and because the law of Wisconsin, regarding the remaining state claims, is well-settled and allows easy resolution.

The defendants argue that the officers are entitled to summary judgment with regard to any remaining state law claims under Wisconsin law which provides in pertinent part that no suit may be brought against any government "officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Wis. Stats. Section 893.80(4). "The general rule acknowledged in Wisconsin is that a public officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office." Barillari v. Milwaukee, 194 Wis. 2d 247, 257 (1995) (citations omitted). The statute provides immunity from liability for the discretionary acts of public officers. Id. The Wisconsin Supreme Court noted three exceptions which exist to this general rule of immunity: (1) a public officer or employee does not enjoy immunity if he or she engages in conduct which is malicious, willful and intentional; (2) a public officer or employee is not immune from liability if he or she negligently performs a ministerial duty; and (3) a public officer may face liability when he or she is aware of a danger that is of such quality that the public officer's duty to act becomes absolute, certain and imperative. Id. at 257-58. The Court concludes that the individual police officers were acting in a discretionary manner and their conduct was not malicious, willful and intentional. Moreover, the officers did not possess the requisite degree of knowledge that after a violent struggle which resulted in handcuffing Mr. Phillips in a face-down prone position, Mr. Phillips would stop breathing after a few minutes. Once the officers realized Mr. Phillips was not breathing they took immediate action. The undisputed facts demonstrate that the police officers acted conscientiously, carefully and in compliance with police procedures taking into consideration the totality of the circumstances. Thus the Court finds that all of the municipal defendants are immune from this action as a matter of law under Wis. Stats. Section 893.80(4). Therefore, the defendants' Motion for Summary Judgment on these counts is granted, and the Court dismisses the pendent state claims contained in the complaint.

D. Remaining defendants James Rice and Harold Ray Schmidt.

Plaintiff has listed James Rice and Harold Ray Schmidt as defendants in this lawsuit as well. The record reflects that Mr. Rice was one of the security guards on duty at the Ambassador Hotel during the restraint of Mr. Phillips, however, Mr. Schmidt is not identified anywhere in the record and consequently his connection to the underlying lawsuit is unknown, although the Court speculates he was an employee at the Ambassador Hotel. On November 11, 1994, the plaintiff requested permission to make service of the summons and complaint on James Rice and Harold Ray Schmidt by publication of the summons in the Daily Reporter. The plaintiff made this request after being unable to personally serve or locate these defendants whose last known addresses were in Milwaukee County. The Court granted plaintiff's request on December 12, 1994, December 30, 1994 and January 6, 1995. Because the underlying federal claims creating subject matter jurisdiction have been dismissed against the City of Milwaukee, Police Chief Arreola and the Milwaukee Police Officers, the Court dismisses the claims against Mr. Rice and Mr. Schmidt from federal court.

IV. CONCLUSION

Therefore, entry of summary judgment is in order for the moving defendants because as movants they have established uncontroverted facts entitling them to summary judgment. For the foregoing reasons, the Court holds that the doctrine of qualified immunity applies to claims against the individual police officers, the plaintiff has failed to identify a policy or custom needed to support a 42 U.S.C. Section 1983 claim, and the defendants are entitled to summary judgment on pendent state law claims.

IT IS THEREFORE ORDERED that the plaintiff's Motion for Partial Summary Judgment is **DENIED** and the defendant's

Motion for Summary Judgment is **GRANTED** and this case is **DISMISSED** in its entirety.

SO ORDERED this 24th day of April, 1996, at Milwaukee, Wisconsin.

/s/_____
ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ESTATE OF JAMES PHILLIPS III,
RAYE M. PHILLIPS, SPECIAL ADMINISTRATOR
OF THE ESTATE OF JAMES PHILLIPS III,
and on her own behalf,

Plaintiff, Case No.: 94-C-999

v.

CITY OF MILWAUKEE,
PHILIP ARREOLA,
THEODORE BUSCH,
ROBERT DUARTE,
DENNIS HINTZ,
MARY RILEY,
JAMES RICE, and
HAROLD RAY SCHMIDT,

Defendants.

DECISION AND ORDER

Before the Court is plaintiff's Motion to Reconsider brought pursuant to Federal Rule of Civil Procedure 59. For the reasons that follow, the plaintiff's Motion to Reconsider is DENIED.

On April 24, 1996, this Court in a Decision and Order granted defendant's Motion for Summary Judgment, denied plaintiff's Motion for Partial Summary Judgment and dismissed the above-captioned matter in its entirety. In its Decision and Order, the Court held that Milwaukee Police Officers Busch, Duarte, Hintz and Riley were entitled to dismissal from suit under the doctrine of qualified immunity and that the plaintiff failed to establish a deprivation of a constitutional right or a policy or custom to support the theory that

the City of Milwaukee and its Police Chief may be held liable in this cause of action. On April 29, 1996, the plaintiff filed a timely motion pursuant to Fed. R.Civ.P.59 requesting that the Court reconsider its April 24, 1996 Decision and Order. The plaintiff argues that material facts are in dispute, and therefore, this Court erred in granting summary judgment based on qualified immunity. In particular, the plaintiff points to a number of undisputed facts which the Court omitted in its Decision and Order which the plaintiff views as material requiring that summary judgment be denied. The Court disagrees.

It is well-settled law in the Seventh Circuit that "the issue of qualified immunity is a legal question for the trial court, not the jury. Although the qualified immunity determination is a legal question it is not answered in the abstract but in reference to the particular facts of the case." Rakovich v. Wade, 850 F.2d 1180, 1201-02 (7th Cir.)(en banc), cert. denied, 488 U.S. 968 (1988)(citations and footnotes omitted). Quite simply, qualified immunity is "a powerful shield that insulates [government] officials from suit." Gregorich v. Lund, 54 F.3d 410, 413 (7th Cir.1995). And as stated in the Court's Decision, the doctrine of qualified immunity "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096(1986).

The undisputed facts indicate that Mr. Phillips had been asked to leave the Ambassador Hotel and was subsequently found barricaded in his room by Mr. Kassin, a security guard at the hotel, and James Rice. According to uncontroverted deposition testimony, Officers Riley and Hintz arrived on the scene and attempted to engage Mr. Phillips in conversation and asked Mr. Phillips to remove his hands from his pockets. Mr. Phillips was unkempt, shaking, sweating and visibly scared. When Mr. Phillips took his hands out of his pockets, he had a pen clenched in each hand. The officers each grabbed a hand of Mr. Phillips in order to release the pens and attempted to get him on the bed, but Mr. Phillips resisted, and consequently a struggled between the police officers and Mr. Phillips ensued and escalated.

The uncontroverted testimony of Kassin, a citizen witness, recounted in detail by the Court in its Decision and Order, is corroborated by the testimony of Rick Scott, Officers Hintz, Riley, Duarte, Busch and Edward Meade, the EMT technician from the ambulance. The undisputed facts reveal that the police officers restrained a individual who was unkempt and exhibiting bizarre behavior and tightly clenched two ball-point pens in his fist. Mr. Phillips was extremely resistant to the officers attempts, both verbal and physical, to release his grip on the pens. The more the officers tried to release the pens, the harder Mr. Phillips struggled. The Court finds that the police officers followed appropriate police procedures by first attempting to talk to Mr. Phillips and then followed appropriate police procedures in their restraining and handcuffing of Mr. Phillips given his violent struggle.

The Court again concludes the officers attempt to restrain Mr. Phillips was not unreasonable. It was a reasonable response of the officers to attempt to remove the pens from an individual as large and potentially unpredictable as Mr. Phillips. The officers' response was a precautionary measure, appropriate in the context of the surrounding circumstances. Police officers faced with a mentally unstable individual, with a recent history of bizarre behavior, should be able to assess the situation and intervene appropriately without fearing a lawsuit. The police officers realized that Mr. Phillips required mental observation due to his mental and physical condition and put in place the proper procedures to convey Mr. Phillips to the hospital via an ambulance instead of to jail. Once Mr. Phillips was restrained, he seemed to relax, calm down and stopped struggling. Within a matter of minutes, upon the arrival of the ambulance, it was determined that Mr. Phillips was not breathing. The police officers and ambulance personnel began administering CPR until the paramedics arrived and took Mr. Phillips to the hospital. Unfortunately, Mr. Phillips never recovered and died the next day.

The plaintiff points to a number of facts omitted by the Court in its Decision and Order which the plaintiff views as significant. For example, the plaintiff notes that the police officers "had to catch their breath, immediately following the restraint of Mr. Phillips." The Court does not view this as a material fact precluding summary

judgment. The Court speculates that the plaintiff draws the inference that if the officers were experiencing shortness of breath, then Mr. Phillips face down on the ground was probably also experiencing difficulty in breathing. However, this is not a material fact precluding summary judgment on the issue of whether the police officers are entitled to qualified immunity. The police officers utilized appropriate police procedures to restrain Mr. Phillips, who resisted, and consequently, had to be forced to the ground and handcuffed. Of course, with the benefit of hindsight, one can critique the actions of the officers and propose other steps that possibly could have been taken to possibly prevent the death of Mr. Phillips. Nonetheless, the doctrine of qualified immunity exists to protect public officials from exactly this degree of microscopic scrutiny. "While inadvertence or negligence may render their actions imperfect, public officials may only be held legally responsible for knowingly and consciously violating the Constitution." Estate of Frank v. City of Beaver Dam, 921 F.Supp. 590, 600 (E.D. Wis.1996). The facts cited by the plaintiff in the Motion for Reconsideration fail to assert any facts constituting deliberate indifference, intentional or reckless disregard or callous indifference to the rights of Mr. Phillips.

In the instant case, the officers experienced difficulty restraining Mr. Phillips due to his violent struggle, obesity and strength. Once he was restrained, the officers continued to monitor him as the ambulance arrived. According to all eye witnesses, the time that elapsed was a matter of minutes between the restraint of Mr. Phillips and the realization that the was a pulseless nonbreather, and the Court does not find that within those intervening minutes, the police violated Mr. Phillips' constitutional rights by not rolling him on his side or sitting him up, given his unpredictable behavior, prior violent struggle and attempt to injure the officers, and large size. When deciding whether the police officer defendants are entitled to qualified immunity, the Court should ask whether the police officers acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable course of conduct should have been followed. See Hunter v. Bryant, 502 U.S. 224, 228-29, 112 S.Ct. 534, 537 (1991). The Court having analyzed the undisputed facts with regards to the officers' conduct again concludes the police officers' actions were objectively reasonable.

When the police officers restrained Mr. Phillips, they abided by the policies and practices of the MPD, they had no reason to know or suspect that handcuffing an individual behind his back, face-down could possibly lead to death. Moreover, the record is replete with a number of factors that either caused or contributed to the death of Mr. Phillips. As the Court acknowledged in its Decision and Order, the end result of the police officers' encounter with Mr. Phillips was undeniably tragic, however, in analyzing the encounter step-by-step, the police officers, in reaction to Mr. Phillips' violent behavior, acted permissibly at every point. The Court having reconsidered its Decision and Order again concludes that Milwaukee Police Officers Busch, Duarte, Hintz and Riley did not violate the constitutional rights of James Phillips and are dismissed from this lawsuit under the doctrine of qualified immunity. The plaintiff has failed to establish a genuine issue as to any material fact, and therefore, defendants are entitled to judgment as a matter of law.

Although the Court reviewed the policies and procedures of the City of Milwaukee Police Department in its Decision and Order, this Court's determination that the individual police officers did not violate Mr. Phillips' Fourth Amendment rights necessarily renders moot the issue of whether the policies of the City of Milwaukee Police Department are unconstitutional. Because the constitutional rights of Mr. Phillips were not violated, the policies of the City of Milwaukee Police Department need not be reviewed for their constitutionality.

IT IS THEREFORE ORDERED that the plaintiff's Motion for Reconsideration Pursuant to Federal Rule of Civil Procedure 59 be and hereby is **DENIED**.

SO ORDERED this 3rd day of June, 1996, at Milwaukee, Wisconsin.

/s/_____
ROBERT W. WARREN
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2628

ESTATE OF JAMES PHILLIPS III and, RAYE M. PHILLIPS, Special Administratrix of the Estate of JAMES PHILLIPS III, and on her own behalf,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE, PHILIP ARREOLA, THEODORE BUSCH, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 94 C 999-**Robert W. Warren,** Judge.

ARGUED NOVEMBER 4, 1996-DECIDED AUGUST 15, 1997

Before BAUER, RIPPLE and MANION, Circuit Judges.

RIPPLE, *Circuit Judge*. Milwaukee police officers were called to the Ambassador Hotel on May 6, 1993 to remove James Phillips, III from his room. When the officers arrived, he put up a struggle that escalated until the officers handcuffed Mr. Phillips and placed him face down on the floor. Mr. Phillips then stopped

breathing and died the next day. His mother, Raye Phillips, as special Administratrix of her son's estate and on her own behalf, brought this suite alleging that the officers used excessive force in seizing her son and that the City of Milwaukee was also liable for having an unconstitutional policy allowing such force and for failing to train its officers properly. The district court granted summary judgment to the defendants. For the reasons given in the following opinion, we affirm.

I
BACKGROUND

A. *Facts*

On May 5, 1993, Mr. Phillips was evicted from the Ambassador Hotel by the general manager, Rick Scott. Prior to his eviction, Mr. Phillips had been behaving in a strange and disorderly manner. For example, he had placed furniture in the hallway in front of his room and had thrown a chair out of his window. He also had stuffed his clothes into the bathtub while running the water, thereby overflowing the tub. It was because of Mr. Phillips' disruptive behavior that Scott asked Mr. Phillips to leave the hotel.

Mr. Phillips initially complied with Scott's request, but he returned the next morning, May 6. With a key he apparently had retained, Mr. Phillips reentered his old room undetected. The head of housekeeping was on duty that morning and went into Mr. Phillips' old room to check the condition of the room's carpeting. When the employee entered the room, she encountered Mr. Phillips, who was naked at the time. She became frightened and ran out of the room. In response, Mr. Phillips attempted to barricade himself in the room by locking and chaining the door. Gary Kassin, a security guard at the hotel, arrived on the scene and tried to coax Mr. Phillips into unlocking the door. Mr. Phillips was uncooperative, and Kassin eventually unlocked the door with a master key and then had to cut the chain on the door.

When Kassin and James Rice, another hotel employee, entered the room, Mr. Phillips was wearing a trench coat, but was

otherwise naked. Kassin testified that Mr. Phillips "was just going nuts" and was shaking "like a leaf." Kassin Dep. at 15. Kassin noticed that Mr. Phillips had thrown the fans that were drying the carpet out of the window and had damaged other property in the room. Drawers were broken; furniture was moved to barricade the door; the sheets were torn off the bed and were soaking wet; the bathroom was in shambles; in short, "the place looked like a disaster area." *Id.* at 16. Kassin asked Mr. Phillips to put on his pants and called down to the desk to have hotel personnel call the police. Kassin and Rice then sat with Mr. Phillips while they waited for the police to arrive.

The first Milwaukee police officers on the scene were defendants Dennis Hintz and Mary Riley. The desk clerk at the hotel told the officers about the troubles the hotel had experienced with Mr. Phillips. The officers were informed that Mr. Phillips had been behaving strangely the past two days, that he had been evicted for flooding his room, and that he had just thrown fans out of his window to the parking lot below. The officers proceeded to the third floor where they encountered a security guard who reiterated that Mr. Phillips was behaving in a bizarre fashion. The officers then entered the room. Mr. Phillips was wearing a trench coat, no shirt, and trousers that were about to fall down; he appeared unkempt and soiled and was visibly shaking and sweating. Officer Hintz walked to the window and observed two fans lying in the parking lot. Officer Riley noticed that a framed picture, too large to throw out of the window, had been moved as if Mr. Phillips had attempted to throw it out as well.

Officer Hintz asked Mr. Phillips what is name was and what was going on, but got no response. The officer told him to pull up his pants, which Mr. Phillips did. Officer Riley then asked several questions of her own, but Mr. Phillips responded only with unintelligible sounds. At that point, one of the hotel employees told the officers to be careful because Mr. Phillips had a ball point pen clenched in each hand. Kassin testified that, given Mr. Phillips' size and the manner in which he held the pens, Mr. Phillips could have caused injury to the officers if he had lunged at them with the pens. Officer Hintz feared for his safety and grabbed one of Mr. Phillips'

wrists; Officer Riley grabbed the other. Mr. Phillips resisted, and a struggle ensued.

The struggle, though intense, was not marked by any violent behavior on the part of the police. Mr. Phillips was strong and refused to drop the pens; he struggled to break free of the officers' grasps. For their part, the officers could not pry Mr. Phillips' fingers apart, so the pens remained in Mr. Phillips' clenched fists. As a result, Officer Hintz decided that Mr. Phillips should be placed on the bed to control him without injuring anyone. According to Kassin, the officers were not shouting or being abusive. They were telling Mr. Phillips that everything would be fine and that they were just going to take him out of the hotel. It appeared to Kassin that the officers were trying to help Mr. Phillips. Mr. Phillips, on the other hand, became extremely violent when the officers tried to move him over to the bed. He began thrashing his arms and pulling with his shoulders and upper body. As a result, the officers decided to place Mr. Phillips on the floor instead. With the aid of hotel personnel, the officers succeeded in bringing the struggling Mr. Phillips to the floor. Once there, Mr. Phillips became more violent, kicked his feet and tried to bite Officer Riley. The hotel staff held Mr. Phillips' legs while each officer managed to place a pair of handcuffs on each of Mr. Phillips' wrists. Due to the size of Mr. Phillips, the officers connected the handcuffs so that his arms were restrained behind his body by two sets of handcuffs connected in the middle.

Mr. Phillips continued to struggle and kick violently while on the floor. Officer Riley placed her knee on Mr. Phillips' right shoulder blade to hold him down and to keep him from turning over and kicking. Because of the intensity of Mr. Phillips' struggling, Officer Hintz was certain that Mr. Phillips could have turned himself over absent the pressure Officer Riley was applying. Kassin testified that Officer Riley's knee was "gently sitting on [Mr. Phillips] so he couldn't raise up" for about thirty seconds. Kassin Dep. at 28, 55. Officer Riley estimated that she had her knee on Mr. Phillips' back for about a minute. Kassin recalled further that Officer Riley did not have much of her weight on Mr. Phillips as she almost lost her balance.

Based on his observations, Officer Hintz was of the opinion that Mr. Phillips needed mental observation at a hospital, not incarceration. He called for a patrol wagon to transport Mr. Phillips to the Milwaukee County Medical Complex. Officer Riley then observed Mr. Phillips reaching in his pockets. Two dinner forks were found in Mr. Phillips' coat pocket and were removed from his possession. As a result of Mr. Phillips' continuing struggle, Officer Hintz decided to call an ambulance. His thought was that it would be safer to transport Mr. Phillips on a stretcher to keep Mr. Phillips from injuring himself.

At that time, Officer Duarte arrived at the scene as backup. Officer Riley testified that Mr. Phillips was in a face down, handcuffed position for about one minute prior to Officer Duarte's arrival. Officer Duarte held Mr. Phillips' feet to prevent them from kicking. He was asked to call an ambulance by Officer Hintz and did so by radio. A few minutes after the arrival of Officer Duarte, Officer Busch arrived with leg restraints and placed them on Mr. Phillips' ankles, at which time Mr. Phillips' legs were still moving. Kassin estimated that the leg restraints were applied about a minute or so after the handcuffs. Mr. Phillips was not "hog-tied"; that is, the leg restraints and handcuffs were not connected together. After a few minutes, Mr. Phillips began to calm down, and the officers heard the ambulance crew in the hall. Thinking that Mr. Phillips would remain calm if he knew that he was not going to jail, Officer Hintz told Mr. Phillips that an ambulance had arrived to take him to the hospital. Kassin testified that, during the time Mr. Phillips was on the floor, the officers constantly watched him and called his name every twenty or thirty seconds; although on this latter point, Officer Riley could not recall anything being said to Mr. Phillips that the ambulance had arrived.

The record is unclear as to who determined that Mr. Phillips had stopped breathing. Kassin and several of the officers say that Officer Duarte made that determination after rolling Mr. Phillips over and checking his pulse. The ambulance attendants say that they initially made the discovery; that is also Officer Busch's recollection. The ambulance attendants, Edward Meade and Jay Schiellack, arrived within four minutes of receiving the dispatch to transport Mr. Phillips

for mental observation. Officer Busch says that they arrived about thirty seconds to one minute after he had applied the leg restraints. Meade testified that, when he entered the room, he observed that the officers were standing within about a foot of Mr. Phillips. Meade asked the officers some questions about the situation and then, about a minute and a half after entering the room, knelt to ask Mr. Phillips a question. Mr. Phillips did not respond; at that time Meade determined that Mr. Phillips was a "pulseless nonbreather." Meade testified that he left the room to get additional equipment and to call the paramedics; having not anticipated Mr. Phillips' situation, he had left the necessary equipment in the ambulance. Officer Busch testified that he cleared the room of al non-police personnel for a minute or two when Meade announced Mr. Phillips' status because, at that point, the scene was a possible homicide scene. Officer Busch says that only the ambulance personnel and paramedics were allowed back in the room. Meade says simply that he left voluntarily to get more equipment and returned to the room without any problem. In any event, during the time that Meade was gone, the officers performed CPR in an attempt to revive Mr. Phillips. When the ambulance attendants returned, they continued administering CPR. After a few minutes, one of the ambulance crew became tired, and an officer took over chest compressions for him. The paramedics arrived soon thereafter and took over the care of Mr. Phillips. Mr. Phillips regained a pulse.

Mr. Phillips was taken to Sinai Samaritan Hospital. He died the next day. Dr. Steven Kream diagnosed Mr. Phillips' condition as involving cardiac arrest, anoxic encephalopathy/probable brain death, thyroid storm, Graves' disease and schizophrenia. Dr. Kream explained that these were contributing factors leading to Mr. Phillips' death. Dr. Kream opined that brain death can occur within three to four minutes of low oxygen to the brain and that brain death can occur even sooner in a person like Mr. Phillips who has suffered from disease. A thyroid storm results in extreme over-activity; a person with that condition may experience sweating, rapid breathing, a rapid pulse, and an active nervous system and heart. According to Dr. Kream, the manifestations of a thyroid storm are not necessary observable. A thyroid storm left untreated can cause death.

Dr. Jeffrey Jentzen performed an autopsy on Mr. Phillips on May 8. He determined that Mr. Phillips was an extremely obese individual. In his deposition, Dr. Jentzen explained that, when an obese person is placed on the floor in a prone position, his ability to breathe is inhibited. Dr. Jentzen also took note of Mr. Phillips' history of schizophrenia and Graves' disease. He found that Mr. Phillips' heart was moderately enlarged and that Mr. Phillips' thyroid gland was extremely enlarged and almost wrapped completely around Mr. Phillips' trachea. Dr. Jentzen opined that a reasonable individual or police officer would not have been able to detect Mr. Philips' heart and thyroid problems upon observation. The autopsy revealed some minor abrasions on Mr. Phillips' body, but there were not external injuries to the head, scalp or neck region. Nor did the doctor observe any hemorrhaging in body cavities to suggest trauma. The death certificate says that the cause of death was "[s]udden unexpected death associated with law enforcement restraint."R.29, Ex.28. Dr. Jentzen explained that this "cause of death" reflected the totality of the circumstances surrounding Mr. Phillips' demise. He explained that placing Mr. Phillips in a prone position with his hands behind his back may have been a contributing factor to Mr. Phillips' death. Mr. Phillips' obesity and other physical problems also contributed. Dr. Jentzen additionally noted that Mr. Phillips had not been taking his medication for his psychiatric condition.

The officers testified that leaving Mr. Phillips face down while handcuffed comported with the Milwaukee Police Department's policies. Since Mr. Phillips' death, the policy has been amended; officers are now told to seat or stand an individual as soon as possible once the individual is restrained.

B. *District Court Proceedings*

The district court granted summary judgment to the defendants, primarily on the ground of qualified immunity. *See Estate of Phillips v. City of Milwaukee*, 928 F.Supp. 817 (E.D. Wis. 1996). Noting that all claims of excessive force by law enforcement officials are analyzed under the Fourth Amendment, *see Graham v. Connor*, 490 U.S. 386, 395 (1989), the court further concluded that the seizure in this case was reasonable. The court noted that the

officers properly had grabbed Mr. Phillips' hands to release the pens and that the struggle then had escalated. The take-down was reasonable, as was the use of leg restraints and handcuffs, the court stated, because of Mr. Phillips' aggressive behavior. The court further determined that, after Mr. Phillips had been cuffed, he had been monitored by the officers. According to the district court, the record demonstrated that only one or two minutes passed from the time Mr.Phillips stopped struggling to the time the ambulance arrived. The events that followed--Meade's investigation, acquiring medical equipment, beginning CPR -- transpired in a matter of minutes. Because no question of material fact existed as to whether the force used was excessive or whether the officers knew Mr. Phillips would stop breathing, the court decided there was no possibility that the officers acted unreasonably under the circumstances.

Upon reaching the plaintiffs' claims against the City of Milwaukee and Police Chief Philip Arreola, the court opined that its finding that the officers did not violate Mr. Phillips' constitutional rights mooted the question whether the policies of the City were unconstitutional. In any event, the court held, the plaintiffs could not prevail on these claims because they could not show that the failure to train amounted to deliberate indifference. The court determined that the plaintiffs' submissions--a letter, articles and reports discussing in-custody deaths--allegedly placing the City on notice involved situations different from the one in which Mr. Phillips was found. The arrestees in those cases, for example, had been hog-tied, transported in a prone position, confined in a small space or placed in a choke hold. The court also took the view that none of the prior in-custody deaths that had occurred in the City was similar to Mr. Phillips' death: two from cocaine, one from natural causes, and two from suicide.

The district court retained jurisdiction over the plaintiff's state law claims in the interest of judicial economy because, in its view, Wisconsin law clearly foreclosed their claims. Police officers are generally immune under Wisconsin law from liability for injuries resulting from acts performed within the scope of the officers' duties. *Barillari v. City of Milwaukee*, 533 N.W.2d 759, 763 (Wis.1995). The court concluded that none of the three exceptions to the general

rule of immunity applied here: The officers had not (1) engaged in malicious, willful or intentional conduct, (2) negligently performed a ministerial duty, or (3) had an absolute duty to act because they were aware of a danger justifying such a duty. Because the court had granted summary judgment to the police officers and the City on the plaintiffs' federal claims, it dismissed the claims against the remaining defendants, James Rice and Harold Ray Schmidt, as well.

II
DISCUSSION

Summary judgment is appropriate if the materials in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.56(c). A party is entitled to such a judgment if, based on the evidence in the record, no reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52, 255 (1986). "A party must present more than mere speculation or conjecture to defeat a summary judgment motion." *Sybron Transition Corp. v. Security Ins. Co.*, 107 F.3d 1250, 1255 (7th Cir.1997). We review the district court's decision to grant summary judgment de novo. *Id.*

A.

At the outset, we note what is not at issue in this case. The plaintiffs do not claim that the police officers lacked the requisite justification for seizing Mr. Phillips; they concede that the officers were within their rights to take Mr. Phillips into custody. Nor do they contend that the officers used excessive force in grabbing Mr. Phillips' wrists and taking Mr. Phillips to the floor. Their claim is that the excessive force occurred during the few minutes that Mr. Phillips was on the floor in a prone position. In the plaintiffs' view, the officers placed Mr. Phillips in a precarious position, thereby depriving him of sufficient oxygen, without sufficiently monitoring him to determine if he was breathing.

Excessive force claims arise under the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1,8(1985)("[I]t is plain that [the]

reasonableness [of a seizure under the Fourth Amendment] depends on not only when a seizure is made, but also how it is carried out."). In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that "*all* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395 (emphasis in original). S*ee generally Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 474-76 (7th Cir.1997)(discussing *Graham*); *Frazall v. Flanigan*, 102 F.3d 877, 882-83 (7th Cir. 1996)(same); B*rownell v. Figel*, 950 F.2d 1285, 1292-93(7th Cir.1991)(same). The reasonableness standard cannot be defined precisely, nor should it be applied in a mechanical fashion. *Graham*, 490 U.S. at 396. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* (internal quotations and citation omitted). Due to the fact-specific nature of the inquiry, the determination whether a police officer utilized excessive force depends on the totality of the circumstances surrounding the encounter. *Frazell*, 102 F.3d at 882. We must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396(citing *Garner*, 471 U.S. at 8-9). In addition, the reasonableness inquiry is an objective one: The "particular" use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

Notwithstanding that the plaintiffs concede that the force used was reasonable up until the point that Mr. Phillips was placed in a prone position on the floor, we begin our analysis with the moment the officers arrived on the scene in order to place the officers' conduct in context. When Officers Hintz and Riley initially arrived at the

hotel, the owner informed that a man was exhibiting erratic and disorderly behavior, damaging property and throwing items out of the window to the ground three floors below. Their own initial observation of Mr. Phillips confirmed what they had been told. Mr. Phillips was shaking like a leaf and sweating profusely. The officers noticed that the room was in disarray and that the fans had indeed been jettisoned from the window. Mr. Phillips was unresponsive and appeared agitated. Faced with this situation, the officers were entirely reasonable in grabbing Mr. Phillips' wrists when informed that he had two ball-point pens in his fists. Kassin testified that, due to Mr. Phillips' size and the manner in which he held the pens, Mr. Phillips could have caused severe injury with the pens. The officers were reasonable in trying to protect themselves and the hotel employees by disarming Mr. Phillips.

From that point, the struggle escalated, but the uncontroverted testimony is that Mr. Phillips' actions caused the escalation. He thrashed about violently when his wrists were grabbed and refused to unclench his fists to drop the pens. The officers attempted to soothe him with words and to take him over to the bed; indeed, Kassin testified that it appeared that the officers were merely trying to help Mr. Phillips. Yet the officers had little success in this regard. Mr. Phillips was strong, and the officers could not remove the pens, move him to the bed or get his arms behind him. So the officers understandably decided to take Mr. Phillips to the floor, which required that his legs be taken out from under him. This maneuver was accomplished with the aid of hotel employees.

Once on the ground, Mr. Phillips continued to struggle. He tried to roll over and kick the officers, and he at one point attempted to bite Officer Riley. The officers' response was reasonable. Officer Riley placed just enough weight on Mr. Phillips to keep him from rolling over and kicking. If she had not held Mr. Phillips down, the witnesses testified, Mr. Phillips could have gotten up again and would have been a danger to himself, the officers and the hotel employees. Almost immediately after Mr. Phillips was on the ground, Officer Duarte arrived as backup; he confirms that Mr. Phillips was still moving at that point. Officer Duarte then called an ambulance and took up a position at Mr. Phillips' feet to protect those around Mr.

Phillips from his kicking. Officer Busch arrived immediately thereafter and solved the kicking danger by placing restraints on Mr. Phillips' legs. The restraints placed on Mr. Phillips' legs were similar to handcuffs and allowed the legs to move apart to some degree; the leg restraints were not connected to his handcuffs so as to place Mr. Phillips in a hog-tied position. It was reasonable to restrain Mr. Phillips' legs given the peril posed by his continued kicking. The testimony as to the timing of these events varies somewhat, but the difference is immaterial. It is undisputed that just a few minutes passed between Mr. Phillips' wrists being cuffed and his legs being restrained, and at any rate, Mr. Phillips was still moving at the time the leg restraints were applied.

We hold that these actions of the officers amount to an objectively reasonable response to the escalating situation they faced. "Authorities must be allowed 'to graduate their response to the demands of any particular situation.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 542(1985)(quoting *United States v. Place*, 462 U.S. 696, 709 n.10(1983));*see Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 475-76(7th Cir. 1997)(indicating that the amount of force that is justified increases as the confrontation escalates). Mr. Phillips was placed in a prone position with this hands and legs restrained because of the need to incapacitate him and to protect the safety of the officers and other witnesses from the dangers posed by Mr. Phillips' violent behavior. Restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest. *Maynard v. Hopwood*, 105 F.3d 1226, 1227-28 (8th Cir. 1997)(holding that officers' actions were objectively reasonable as a matter of law when they handcuffed resisting individual's wrists, placed hobble restraints on individual's legs and placed individual face down in squad car). The medical evidence and witness testimony in this case shows that the officers did not punch, slap, kick or otherwise deliver a blow to Mr. Phillips' body. *Cf. Frazell v. Flanigan*, 102 F.3d 877, 885(7th Cir. 1996)("Yet it is one thing to use force in subduing a potentially dangerous or violent suspect, and quite another to proceed to gratuitously beat him."). Kassin's testimony confirms that the officers were not beating Mr. Phillips, but were assuring him and trying to be of assistance.

Our holding that it was reasonable to place Mr. Phillips on the floor in a prone position necessarily implies that the officers did not use " deadly" force to restrain Mr. Phillips. Given the situation here, the officers would not have been justified, and they conceded as much, in using deadly force to arrest Mr. Phillips. *See Tennessee v. Garner*, 471 U.S. 1(1985)(holding that deadly force is appropriate only in certain situations). For a particular application of force to be classified as "deadly," it must at least "carry with it a substantial risk of causing death or serious bodily harm." *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir.1988)(internal quotation omitted); *see Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50(7th Cir.1994). Under this standard, restraining a person in a prone position, with constant monitoring, cannot be characterized, in itself, as "deadly" force.[1] Here, the officers did not hog-tie, choke or transport Mr. Phillips. Nor were his medical conditions (an enlarged heart, an enlarged thyroid, Graves' disease and a thyroid storm), which were contributing factors to Mr. Phillips' death, observable to the untrained eye. *See Frazell*, 102 F.3d at 885 (noting that officer's conduct in the face of knowledge of suspect's medical problems may be objectively unreasonable, although same conduct might be reasonable absent such knowledge). None of the plaintiffs' materials supports that restraining an individual in a prone position "carr[ies] with it a substantial risk of causing death or serious bodily harm." *Robinette*, 854 F.2d at 912 (internal quotation omitted). The officers placed Mr.

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[1] The plaintiffs have submitted materials that documentcases around the Nation in which individuals have died in police custody while restrained in a manner that limited their oxygen intake. Those encounters set forth in the materials, however, typically involve officers' using choke holds and hog-ties or transporting an individual in a prone position. Also, additional circumstances, such as drug use or other physical problems, usually contributed to the deaths in the situations studied.

Phillips in a face down position to restrain him from injuring himself and others. That force, it turned out, when combined with Mr. Phillips' other health problems, resulted in Mr. Phillips' death. But the question is not whether the officers' actions aggravated an undiscovered injury or condition, but whether their actions were objectively reasonable under the circumstances. *See Brownell v. Figel*, 950 F.2d 1285, 1293(7th Cir.1991). Placing Mr. Phillips in a prone position was reasonable under the circumstances and therefore comported with the Fourth Amendment.

Having decided that placing a person in a prone position while handcuffed on the floor does not, in and of itself, violate the Fourth Amendment , we must address whether the officers' conduct while Mr. Phillips was on the floor can be deemed unreasonable. The plaintiffs claim that it was not reasonable for the officers to place Mr. Phillips in a position that denied him oxygen and then failed to notice that he was having trouble breathing. The record, though, will not support an inference that the officers failed to take reasonable steps to monitor Mr. Phillips. Although the plaintiffs contend that Mr. Phillips stayed on the floor without moving for five minutes, the testimony to which the plaintiffs invite our attention shows that Mr. Phillips was still moving when Officer Busch applied the leg restraints and that the ambulance crew arrived a minute or so afterwards. In any event, everyone agrees that Mr. Phillips was on the floor for only a few minutes before the ambulance crew arrived. More importantly, the witnesses' testimony is also clear that the officers stayed right by Mr. Phillips during those few minutes. Some testimony indicates that two officers knelt on each side of him, while the other officers stood right beside him. Kassin testified that everyone in the room kept an eye on Mr. Phillips to make sure that he was calming down and was not injuring himself or others: "[W]e're all watching, I mean, constantly they're watching him because he was struggling so hard we knew he was tired, so we thought he was resting....[H]e was moving a little bit, but you could see him breathing....[E]verybody is watching him, you know, watching him laying on the floor." Kassin Dep. at 30. Kassin also testified that the officers called Mr. Phillips' name every twenty or thirty seconds to make sure that Mr. Phillips was responding. Even though he alone reports this piece of information, no one reports that the officers failed to monitor Mr. Phillips.

The plaintiffs concede as much, but they maintain that the monitoring must have been insufficient because of the tragic result of Mr. Phillips' encounter with the officers. Despite any evidence in the record that the officers failed to monitor Mr. Phillips in a manner that was reasonable under the tense and rapidly moving circumstances they faced, the plaintiffs say that Mr. Phillips' demise is all the evidence they need of reasonableness. The plaintiffs' claim, therefore, essentially rests on "logic akin to the doctrine of *res ipsa loquitur*." *Brownell v. Figel*, 950 F.2d 1285, 1292 (7th Cir.1991). In *Brownell*, the plaintiff "maintain[ed] that the fact he left the hospital able to move and returned a quadriplegic" raised an inference "that the officers at the lockup employed excessive force." *Id.* at 1292. Yet we affirmed the district court's decision to grant summary judgment to the defendants because, "in the absence of any evidence of specific wrongdoing, Brownell's excessive force claim [was] speculative and fail[ed] to raise any material issue of fact for trial." *Id.* at 1293. Here, the plaintiffs' claim similarly is speculative. Absent any evidence to prove that the officers in this case were unreasonable in their handling of Mr. Phillips once he was cuffed on the floor, the reasonableness question ought not be submitted to a jury.

It is true that the evidence of who discovered Mr. Phillips' difficulties is not one-sided, that there is an issue of fact on that point. Kassin, for example, testified that, when Mr. Phillips did not respond to his name being called, an officer determined that Mr. Phillips was a pulseless nonbreather and began performing CPR on him. On the other hand, the ambulance attendants testified that, when they arrived, the officers had not yet realized that Mr. Phillips had stopped breathing; and Officer Busch agreed that the attendants were the first to discover that Mr. Phillips had stopped breathing; and Officer Busch agreed that the attendants were the first to discover that Mr. Phillips was a pulseless non-breather. But *who* discovered that Mr. Phillips was not breathing is a fact of no consequence. The evidence remains uncontroverted that the officers monitored Mr. Phillips while he was on the floor. Even the ambulance attendants, on whose testimony the plaintiffs rely, testified that the officers were standing within about a foot of Mr. Phillips when they arrived. The fact also remains that there is no testimony that the officers ignored Mr.

Phillips while he was in a prone position or that they walked away from him while he was on the floor. That no one noticed that Mr. Phillips was not getting enough oxygen cannot, standing alone, transform these officers' actions into a transgression of constitutional magnitude. Indeed, even the trained ambulance attendant had been in the room for a minute and a half before he determined that Mr. Phillips was not breathing. Under these circumstances, to find that the officers should have monitored Mr. Phillips more carefully would be to judge the officers' actions with the improper benefit of 20/20 hindsight. *See Graham*, 490 U.S. at 396-97 (also stating that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving....").

Finally, there is the issue of Officer Busch's testimony that he cleared the room of all non-police personnel (which ostensibly would include the health care personnel) after it was discovered that Mr. Phillips was a pulseless nonbreather. This testimony does not create a triable issue on the reasonableness of the officers' actions. First, at oral argument, counsel for the plaintiffs expressly stated that he was not claiming that the officers violated Mr. Phillips' constitutional rights by cutting off aid to him. Second, during the two minutes that the room was cleared, the officers performed CPR on Mr. Phillips, thereby caring for his medical needs while the ambulance crew was absent. Third, the ambulance personnel say that they left the room voluntarily after determining that Mr. Phillips was not breathing to get more equipment from the ambulance; because Mr. Phillips' situation had been unanticipated, they had left behind the necessary life-saving equipment. As soon as they returned, they were allowed back into the room without problem. In other words, even in the light most favorable to plaintiffs, Officer Busch's command for non-police personnel to vacate the room must have corresponded with the ambulance crew's voluntary decision to leave the room for more equipment.

We have been assuming that the police officers had a duty to provide medical attention (and not to cut off medical aid) when they seized Mr. Phillips. Yet it is somewhat awkward to conceptualize such an act or failure to act as "excessive force"; indeed, the duty to

render medical aid is more often thought of as one arising under the Due Process Clause or the Eighth Amendment. *See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--e.g., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."). In fact, in their brief, the plaintiffs cite *DeShaney* and contend that the officers violated a constitutional duty by placing Mr. Phillips in a position so that he could not care for himself and then failing to provide for his medical needs, although counsel for the plaintiffs seemed to withdraw from this position to some degree at oral argument. In any event, the Due Process Clause is inapplicable in the present case. As we noted earlier, the Supreme Court has held that "*all* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (emphasis in original). Although it is sometimes difficult to determine when an arrest has ended, an issue with which we have struggled,[2] there is no question that, in this case, the complained-of police actions occurred during the course of Mr. Phillips' seizure. *Graham* itself establishes as much. Like Mr. Phillips, the petitioner in *Graham* already had been handcuffed before the officers applied the physical force of which the petitioner complained. *See* 49 U.S. at 389-90. Indeed, similar to our case, one of the allegations of the *Graham* petitioner, a diabetic, was that the officers had ignored "pleas to get him some sugar." *Id.* at

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[2]*See Reed v. City of Chicago*, 77 F.3d 1049, 1051-52(7th Cir. 1996); *Titran v. Ackman*, 893 F.2d 145, 147(7th Cir.1990); *Wilkins v. May*, 872 F.2d 190, 192-93 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990). *See generally* Mitchell W. Karsch, Note, "Excessive Force and the Fourth Amendment: When Does Seizure End?" 58 Fordham L. Rev. 823 (1990).

389. The Supreme Court nonetheless decided that the Fourth Amendment, not the Due Process Clause, was the proper standard by which to measure the petitioner's claims. Therefore, although "[i]t is true that at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitional passes over from the Fourth Amendment to the due process clause (and after conviction to the Eighth Amendment's cruel and unusual punishments clause...),"*Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988), that point was not crossed in this case, and the Fourth Amendment's reasonableness standard remains the sole standard by which to measure the officers' actions. That being said, although the officers' actions here are not readily thought of as "force," the Fourth Amendment requires that seizures be *reasonable* under all the circumstances; and we do think that it would be objectively unreasonable in certain circumstances to deny needed medical attention to an individual placed in custody who cannot help himself. Indeed, we have remarked before that the Fourth Amendment and the Due Process Clause impose similar duties in that both prohibit excessive force, though the duties apply at different times in the adversarial process and though the respective standards of liability may vary, primarily because the Due Process Clause contains a mental component. *See Titran v. Ackman*, 893 F.2d 145, 147-48(7th Cir.1990); *Wilkins v. May*, 872 F.2d 190, 193 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990). Therefore, although we do not foreclose the possibility that a claim like the plaintiffs' could be cognizable under the Fourth Amendment, we have determined that the officers in this case were objectively reasonable in their handling of Mr. Phillips' medical situation.[3]

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[3] Of course, even if the Due Process Clause had applied and *DeShaney* like duties had arisen in this case, the plaintiffs could have recovered for any failure to provide medical care only if they could have established that the officers had been deliberately indifferent to Mr. Phillips' needs. *See Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir.1991); *Anderson v. Gutschenritter*, 836 F.2d 346, 348-49 (7th Cir. 1988). As should be clear from our Fourth Amendment analysis, this record would not permit such a finding.

B.

Having decided that the officers did not violate the Constitution, we must conclude that neither the City nor Police Chief Arreola can be held liable for Mr. Phillips' death. *See Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995). The City and Chief Arreola "were sued only because they were thought legally responsible for [the officers'] actions; if the latter inflicted no constitutional injury on [Mr. Phillips], it is inconceivable that [the former] could be liable to [the plaintiffs]." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)(per curiam). Similarly, "[i]f a person has suffered no constitutional injury at the hands of the individual police officer[s], the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Id.*(emphasis omitted). Neither the City nor the police officers' supervisor can be held liable on a failure to train theory or on a municipal policy theory absent a finding that the individual police officers are liable on the underlying substantive claim. *See id.; Abbott v. City of Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992).

Likewise, "[b]ecause we find that there was no constitutional violation, it is unnecessary to consider whether [the officers] w[ere] entitled to qualified immunity." *Kraushaar v. Flanigan*, 45 F.3d 1040, 1049 n.4 (7th Cir. 1995)(citing *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1328 (7th Cir. 1993)(Easterbrook, J., concurring)); *accord Crowder v. True*, 74 F.3d 812, 815 (7th Cir.1996)(per curiam). In this case, the officers' actions did not violate any of Mr. Phillips' constitutional rights; thus, there is no need to decide if those rights were clearly established at the time of the encounter. *See Siegert v. Gilley*, 500 U.S. 226(1991); *Schlessinger v. Salimes*, 100 F.3d 519, 523 (7th Cir. 1996), *cert. denied*,117 S.Ct. 2481 (1997).

C.

Finally, we must address the district court's decision to grant summary judgment on the plaintiffs' state law claims, which include

allegations of, for example, battery and wrongful death. The plaintiffs' initial brief to this court contains no argument that the district court erred in its disposition of these claims. Rather, the plaintiffs first maintain that the district court should not have dismissed their state law claims in two pages of their reply brief. "[S]ince this argument was not clearly presented in [the plaintiffs'] initial brief to this Court, it could be deemed waived." *Arch Illinois, Div. of Apogee Coal Corp. v. District 12, United Mine Workers of America*, 85 F.3d 1289, 1294 (7th Cir.1996)(citing *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir.1990)("All arguments for reversal must appear in the opening brief, so that the appellee may address them.")) A necessary corollary to this principle is that "[a]rguments raised for the first time in the reply brief are waived." *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n.5 (7th Cir. 1994); *accord Giffin v. Summerlin*, 78 F.3d 1227, 1231 (7th Cir. 1996)(per curiam). In their reply brief, the plaintiffs purported to be replying to one paragraph at the end of the defendants' brief in which the defendants stated that the district court had properly dismissed the plaintiffs' state law claims. The defendants' perfunctory paragraph remarking that they thought the district court correct in disposing of the state law claims is not enough to put those claims back in play on appeal. We recently explained that allowing an appellant to raise new arguments in reply "would be prejudicial not only to the appellee, but potentially to the appellant as well." *Parrillo v. Commercial Union Ins. Co.*, 85 F.3d 1245, 1250 (7th Cir.1996). If the plaintiffs wanted to press their state law claims on appeal, they should have done so in their initial brief to this court.

At any rate, Wisconsin law makes clear that the district court correctly granted summary judgment to the officers and the City on the plaintiffs' state law claims. "The general rule acknowledged in Wisconsin is that a public officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the individual's public office.'" *Barillari v. City of Milwaukee*, 533 N.W.2d 759, 763 (Wis. 1995)(quoting *C.L. v. Olson*, 422 N.W.2d 614, 617(Wis.1988)); *see* Wis. Stat. Section 893.80(4). In *Barillari* the Supreme Court of Wisconsin explained

the importance of giving immunity to law enforcement authorities for their official acts:

> [W]e conclude that the nature of law enforcement requires moment-to-moment decision making and crisis management....For these reasons, it is clear that law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities. Routinely, police face critical situations, many of which have the potential for violence....In the course of their work, police must often try to console and reassure people who are distraught and fearful. Faced with escalating violence, they must continuously use their discretion to set priorities and decide how best to handle specific incidents. Police officers must be free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their allegedly negligent discretionary decisions.

533 N.W.2d at 764-65. There are, however, three exceptions to the general rule of immunity: (1) "[A] public officer or employee does not enjoy immunity if he or she engages in conduct which is malicious, willful, or intentional";(2) "a public officer or employee is not immune from liability if he or she negligently performs a ministerial duty"; and (3) a public officer "may also face liability when he or she is aware of a danger that is of such quality that the public officer's duty to act becomes absolute, certain and imperative." *Id.* at 763 (internal quotations and citations omitted).

The plaintiffs initially assert that the first exception would apply here if a jury were to find that the officers acted out of anger following the struggle with Mr. Phillips. Assuming that the exception would apply if the officers acted out of anger (which we do not decide), there is no evidence from which a reasonable jury could arrive at such a conclusion. The plaintiffs point to no evidence in the record that would support an inference that the officers were acting out of anger. Indeed, Kassin testified that the officers appeared to be trying to help Mr. Phillips. Moreover, the officers never acted violently toward Mr. Phillips; they did not hit him or use abusive or

angry language during the encounter. Once Mr. Phillips' condition was ascertained, they performed CPR and otherwise assisted the medical personnel in attempting to revive him. The record forecloses the possibility that the officers' conduct was "malicious, willful, or intentional." *Barillari*, 533 N.W.2d at 763.

Nor is there a colorable argument that the third exception could apply to deny immunity to the defendants. There is no evidence that placing a person in a prone position gives rise to dangers of such qualities that an absolute duty arises; nor is there any evidence that the officers knew of any such dangers. Similarly, the medical testimony confirms that Mr. Phillips' pre-existing health problems, and the significance thereof, would not have been detectable by a law person in the officers' position. Likewise, there is nothing in the record to suggest that the officers realized that Mr. Phillips was having trouble getting sufficient oxygen (or had stopped breathing) and failed to act. Indeed, all the witnesses confirm that the officers acted immediately upon the discovery that Mr. Phillips was a pulseless nonbreather.

Finally, the plaintiffs contend, without any citation to authority, that the officers may have been required to arrest Mr. Phillips because he had committed criminal acts, thereby making the arrest a ministerial duty that was performed negligently. As we noted above, "a public officer or employee is not immune from liability if he or she negligently performs a ministerial duty." *Id.* This exception is "[t]he most generally recognized exception to the rule of immunity." *Lister v. Board of Regents of Univ. Wis. Sys.*, 240 N.W. 2d 610, 621(Wis. 1976). Yet "[a] public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Id.* at 622. Although neither party cites the relevant cases, Wisconsin case law clearly forecloses the plaintiffs' attempt to avail themselves of this exception; whether and how to arrest an individual involve discretion. In *Sheridan v. City of Janesville*, 474 N.W.2d 799 (Wis.Ct.App. 1991), the plaintiff brought a negligence action against a municipality and two police officers for "injuries received while the police officers

were performing....sobriety tests and executing the arrest." *Id.* at 801. The court stated that "a claim that the police officers were negligent in deciding whether or not to arrest. Sheridan would clearly be proscribed by the holding in *Linstar*." *Id.* at 802 (internal quotation omitted). The court further held that the officers' conduct in executing the arrest was discretionary in nature:

> Their decisions regarding the manner in which the arrest was effectuated involved numerous applications of governing statutes and case law. They were required to determine whether Sheridan should be searched, handcuffed, subjected to force during execution of the arrest, and given a breathalyzer. These decisions involved "subjective evaluation of the law[.]"

Id. (citation omitted) (also holding that officers' conduct could not fall within the "known present danger" exception to immunity). Similarly, in *Sherry v. Salvo*, 555 N.W.2d 402(Wis.Ct.App.1996), the Court of Appeals of Wisconsin followed *Sheridan* and held that officers who injured a hospital patient during the course of restraining him were immune from liability: "[T]he...officers' acts in restraining Sherry were highly discretionary. They were reacting to highly charged and dynamic circumstances in pursuing and subduing Sherry, and were using their professional judgment as to how that task might best be accomplished." *Id.* at 405. *See also State v. Dekker*, 332 N.W.2d 816(Wis.Ct.App. 1983)(affirming dismissal of criminal complaints alleging that police officers had intentionally failed to perform CPR on arrested individual because duty to render first aid, including CPR, requires police officer to exercise judgment).

The court in *Sheridan* also concluded, on immunity grounds, that the plaintiff had failed to state a claim against the City for inadequate training and supervision because "the [C]ity's training and supervision of its police officers concerning conduct during arrests of disabled persons involves governmental discretion." 474 N.W.2d at 803. "The City is not liable for the discretionary acts of the police department and its officers, acts for which immunity is provided under Section 893.80(4), Stats." *Barillari*, 533 N.W.2d at 765; *accord Sherry, supra.* Because Wisconsin law is clear that the

defendants are entitled to immunity under state law, the district court did not abuse its discretion in deciding to retain jurisdiction over the supplemental state law claims. *See Van Harken v. City of Chicago*, 117 S.Ct. 1846 (1997). Accordingly, we affirm the district court's decision to grant summary judgment in favor of the defendants on the plaintiffs' state law claims.

Conclusion

For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
SEPTEMBER 23, 1997

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

ESTATE OF JAMES PHILLIPS III, and RAYE M. PHILLIPS, Special Administratrix of the Estate of JAMES PHILLIPS III, and on her own behalf, Plaintiffs-Appellants,	] Appeal from the United] States District Court for] the Eastern District of] Wisconsin.]
No. 96-2628 v.	] No. 94 C 999] Robert W. Warren,] Judge.
CITY OF MILWAUKEE, PHILIP ARREOLA, THEODORE BUSCH, et, al., Defendants-Appellees.	]]]]

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on August 29, 1997 by the plaintiffs-appellants, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITH ORAL ARGUMEMT

Date: August 15, 1997

BEFORE: Hon. WILLIAM J. BAUER, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

No. 96-2628

ESTATE OF JAMES PHILLIPS III, and RAYE M. PHILLIPS, Special Administratrix of the Estate of JAMES PHILLIPS, III, and on her own behalf,

Plaintiffs-Appellants

v.

CITY OF MILWAUKEE, PHILLIP ARREOLA, THEODORE BUSCH, et al.,

Defendants-Appellees

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 94 C 999, Robert W. Warren, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)